No. 153

Supreme Court of the United States

OCTOBER TERM, 1950

CITIES SERVICE GAS COMPANY, a corporation,
Appellant,

VERSUS

PEERLESS OIL AND GAS COMPANY, a corporation; CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and PHILLIPS PETROLEUM COMPANY, a corporation,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE APPELLANT

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October, 1950.

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma and dissenting opinions (R. 895-927) are reported in 220 Pac. (2d) 279.

JURISDICTION

The judgment, decree and decision of the Supreme Court of Oklahoma was entered on January 17, 1950 (R. 897). Petition for rehearing was duly filed and was denied, without opinion, by the Supreme Court of Okla-

homa on March 21, 1950 (R. 931, 944). On May 19, 1950, within ninety days from the date said judgment, decree and decision became final, Appellant's petition for appeal was presented to and allowed by the Chief Justice of the Oklahoma Supreme Court (R. 954, 962). The jurisdiction of this Court rests on 62 Stat. 929, 28 U. S. C. A. 1257(2). See, also, Jurisdictional Statement of Appellant.

QUESTIONS PRESENTED

Appellant has taken the liberty of rephrasing and rearranging its several specifications of error in the form of questions presented so as to merge several assignments into a single question and enable this Court to more clearly and accurately understand and consider the position and respective points of contention of Appellant, namely:

1. Is the Supreme Court of Oklahoma lawfully empowered within the meaning of the provisions of the 14th Amendment, as applied to Appellant, to interpolate into 52 O. S. 1941, §39, an unambiguous state act pertaining solely to the conservation of natural gas as a commodity, a price-fixing policy with respect thereto where the state legislature has not either declared any such policy or provided in the act any standard to guide a state commission in the exercise thereof?

2. If the Oklahoma Corporation Commission is lawfully empowered by 52 O. S. 1941, 239, for the purpose of conservation and in the public interest, to fix a minimum price for natural gas produced in Oklahoma, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a producer and purchaser

of natural gas prove facts legally sufficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19514, make the findings it did in support thereof, and limit the effect and operation of said order to the Guymon-Hugoton Field to the exclusion of other Oklahoma gas fields?

3. Is Order 19514 of the Oklahoma Corporation Commission as written, carrying severe penalties for violation thereof, so vague, indefinite and uncertain, the findings of fact and law so intermingled, and the order subject to so many varying and contradictory interpretations that a producer or a purchaser from a producer can not in advance of production or purchase, with clarity and particularity, determine his rights, duties and obligations thereunder as due process requires?

4. Does 52 O. S. 1941, 233, contain a sufficient standard within the meaning of the provisions of the 14th Amendment to guide the Oklahoma Corporation Commission in fixing a price higher than the market, current, or going price and other terms for the taking and purchasing of natural gas different from those prevailing in the field at the time and place of the tender, taking or purchase where the parties thereto cannot agree upon the terms thereof?

5. If the Oklahoma Corporation Commission is lawfully empowered by 52 O. S. 1941, 233, for the purpose of settling a dispute between a producer and a taker or purchaser of gas, to fix the price or terms thereof, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a purchaser and taker of natural gas in Oklahoma prove facts legally suf-

ficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19515, make the findings it did in support thereof, and apply retroactively to Appellant by said order, in settling said dispute, the price and measurement base fixed by its legislative Order 19514, when such applied price was twofold the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the Guymon-Hugoton Field made as authorized by 52 O. S. 1941, 233?

6. Was Appellant granted procedural due process in accordance with the provisions of the 14th Amendment at the hearing before the Oklahoma Corporation Commission leading to the issuance of Order 19515?

7. Do Orders 19514 and 19515 and the respective statutes 52 O. S. 1941, 239, and 52 O. S. 1941, 233, upon which said orders were based, as interpreted and applied to the operations of Appellant under the undisputed and indisputable evidence in the record, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant?

ORDERS AND STATUTES INVOLVED

Orders 19514 (R. 11, 18) and 19515 (R. 19, 28, 29), omitting caption and findings, and the respective state statutes 52 O. S. 1941, 239, and 52 O. S. 1941, 233, upon which said orders were based, the constitutionality of

which orders and statutes as applied to the operations of Appellant is being questioned in this appeal, read:

Order 19514

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"2. This order shall be effective as of January 1st, 1947."

52 O. S. 1941, 239

"Sec. 239. Common source of supply—Excess gas supply—Apportionment and regulation to prevent waste. Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or

equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. Laws 1915, ch. 197, sec. 4."

Order 19515

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That the respondent, Cities Service Gas Company, be and it is hereby required to take natural gas ratably from applicant's well located in Section 8, Township 4 North, Range 16 E. C. M., Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"2. That the respondent, Cities Service Gas Company, be and it is hereby required to take natural gas ratably from applicant's well located in Section 5, Township 4 North, Range 16 E. C. M., Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"3. That respondent shall pay to applicant for the natural gas so taken not less than 7¢ per thousand cubic feet of natural gas at the wellhead, measured at a pressure of 14.65 pounds absolute pressure per square inch.

"4. That no natural gas shall be taken out of the producing structures or formations in the Guymon-

Hugoton field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14,65 pounds absolute pressure per square inch.

"5. This order shall be effective as of January 1st, 1947."

52 O. S. 1941, 233

"Sec. 233. Sale of gas—Prices and amounts of gas to be taken—Delivery. Any person, firm or corporation, taking gas from a gas field, except for purpose of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas. Laws 1913, ch. 198, p. 440, Sec. 3."

For the convenience of the Court all of the pertinent Oklahoma Statutes involved in this appeal are set forth verbatim in Appendices E and F.

STATEMENT

The Hugoton Gas Field is located in the states of Oklahoma, Kansas and Texas and is one of the largest known gas reserves in the United States (R. 536, 537). There are numerous gas wells in this field in each state

(R. 88). This appeal concerns that portion of the Hugoton Gas Field lying within Texas County, Oklahoma, which has been named the "Guymon-Hugoton pool" (R. 537).

The business of Appellant, Cities Service Gas Company, hereinafter called "Cities Service" or "Appellant", is the acquiring of gas reserves by leases, the acquiring of other reserves by means of gas purchase contracts, the production and purchase of gas, and the transportation of it to markets located in Kansas, Missouri, Nebraska, and some in Oklahoma, in which states, with Texas, its operations are confined (R. 390). Cities Service is a producer and purchaser of natural gas in the Guymon-Hugoton pool in Texas County, Oklahoma. Appellant directs the immediate attention of the Court to Exhibit 68 (R. 636A) which is a map in color showing the complete integrated pipe line system of Cities Service during all times material herein, setting forth in yellow the fields in which Cities Service produces gas; in tan the fields in which it purchases gas; in green the fields in which it both purchases and produces gas; and in blue its storage fields.

The companies in addition to Cities Service that take gas out of the Guymon-Hugoton gas pool in Texas County, Oklahoma are: Southwest Public Service Company, Phillips Petroleum Company, and Panhandle Eastern Pipe Line Company (R. 386). Cities Service's purchases of gas in the Guymon-Hugoton pool are by means of pipe line deliveries (R. 390). The producers own their own leases, wells and gathering lines, and bring the gas to the points of delivery on Cities Service's gathering system (R. 390). The sales are made by means of written contracts (R. 390)

and the price (4½¢ per mcf) and the measurement base (16.4 lbs. absolute per square inch) in each contract are the same (R. 393), the ½¢ being for gathering, transportation and delivery (R. 396). The purchases of gas are made for the purpose of supplying Appellant's markets and performing written contract commitments therefor (R. 390). Cities Service takes title to the gas purchased in the pool at the point of delivery as it flows uninterruptedly to its markets in four states (R. 401).

There are approximately 1,062,000 acres of gas proven acreage in the Guymon-Hugoton gas pool and of this Cities Service owns and produces from about three-tenths (.3) of this acreage (R. 417-418). A very small part of the gas produced in the pool is sold in Oklahoma. About 90% of all gas produced and transported out of said pool by the various companies goes into interstate commerce (R. 386-387). Practically all the gas Cities Service produces and purchases goes into interstate commerce (R. 389-390).

On December 9, 1946, Appellee, the Corporation Commission of the State of Oklahoma, hereinafter called "Commission", after a hearing, issued simultaneously two gas price-fixing orders numbered respectively 19514 and 19515, both made effective January 1, 1947 (R. 11-18, 19-29). Order 19514, legislative in character, is limited in effect and operation solely to the Guymon-Hugoton gas pool in Texas County, Oklahoma, and in substance commands that no natural gas shall be taken out of the producing structures or formations in said field at a price at the wellhead of less than seven cents (7¢) per mcf measured at a

pressure of 14.65 pounds absolute pressure per square inch* (R. 11-18). Order 19515, judicial in character, is directed solely against Appellant Cities Service as a purchaser of gas in the pool and in substance commands Cities Service to take by purchase, natural gas from two designated wells of Appellee Peerless in said pool and to pay Peerless therefor not less than the seven-cent (7¢) price on the measurement base prescribed by Commission's Order 19514 (R. 19-29).

The Supreme Court of Oklahoma has decided that Commission Order 19514 is based upon and authorized by 52 O. S. 1941, 239, for the sole purpose of preventing waste, protecting correlative rights and the interest of the public (R. 910-911), and Order 19515 is based upon and authorized by 52 O. S. 1941, 233 (R. 905).

The proceeding before said Commission that gave rise to the issuance of each of said price-fixing orders was originated by the filing with Commission of a twofold application by Peerless, a producer of gas in said pool, against Cities Service, a producer and also a purchaser of natural gas therein, owning and operating an interstate gas pipe line system extending therefrom, requesting Commission (a) to order Cities Service to make a connection with and purchase natural gas from a certain well of Peerless in said pool at a price and upon terms to be fixed by said Commission, and (b) to fix the price to be paid by all purchasers of natural gas in said pool (R. 31-38). Said appli-

*The price of 7c per mcf on the pressure base prescribed by the Commission amounts to approximately 7.77c per mcf on the pressure base used by Appellant and others in the Guymon-Hugoton Field.

cation also alleged a written tender of gas from the Peerless well to Cities Service prior to the filing of the Peerless application at a price of 6¢ per mcf (R. 33, 35, 37). The application also alleged that:

> "* * * ten cents (10¢) for one thousand (1000) cubic feet of natural gas, measured at atmospheric pressure, is a reasonable price for natural gas in the Hugoton, Oklahoma gas field, and that by fixing the price to be paid by all purchasers of natural gas in the Hugoton, Oklahoma gas field at ten cents (10¢) per one thousand (1000) cubic feet of natural gas, measured at atmospheric pressure, the Corporation Commission of the State of Oklahoma will prevent waste of natural gas, conserve natural gas, and prevent use of natural gas for inferior purposes" (R. 34).

The Peerless application further stated that Cities Service had signified its willingness to take the natural gas produced from the Peerless well ratably with natural gas taken from wells owned and operated by Cities Service and others in the pool, but a dispute had arisen between Peerless and Cities Service as to the price to be paid for the natural gas to be produced from the Peerless well (R. 33).

At the time of the tender of gas by Peerless from its well to Cities Service and as of the dates of other tenders of gas involved in this case, and at the time of the hearing and issuance of said orders of Commission being questioned in this appeal, there existed in said pool subsisting Order 17867 of Commission governing the production and marketing of gas in said pool, which order still subsists, Exhibit 9 (R. 535-549). Paragraph 4(b) of said Order 17867 (R. 543), as construed and interpreted by the Supreme Court

of Oklahoma (Application of Moran, 201 Okla. 43, 200 Pac. [2d] 758), required that a producer, in order to have its acreage considered or held to be producing acreage, was required to show by its tenders that it was in good faith willing to sell the gas from its wells at the going price in the field, and that going price was substantially the same as market price or current price, *id.* (R. 540, 543). Said order in paragraph 9 thereof (R. 548) also required all purchasers, takers and producers of gas in the pool to comply with the common purchaser and ratable taking provisions of the Oklahoma Statutes by the equitable purchasing, producing and taking of all the gas without discrimination in favor of one producer as against another. There was also in full force and effect at the time of said tenders of gas by Peerless to Cities Service for purchase, Revised Maximum Price Regulation No. 436, Exhibit A (R. 748-790, 447, 448), promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended, 58 Stat. 632, 50 U. S. C. A. 901, *et seq.*, making it unlawful for any person to sell or deliver or pay or receive in the course of trade or business any natural gas at a price higher than the maximum price fixed by said regulation, and providing further that no person "shall agree, offer, or attempt to do any of these things" (R. 749-784). The price under the regulation for dry wellhead gas was 4¢ per mcf, Exhibits 76, 77, 78, 79 (R. 745-747, 447).

Cities Service responded to the Application of Peerless by a written answer filed with Commission, among other things denying the jurisdiction and authority of Commission to grant Peerless the relief requested because, *inter*

alia, the granting of such relief would contravene the due process, equal protection and commerce clauses of the Federal Constitution (R. 46-63). In its answer Cities Service voluntarily offered to take and purchase gas from the Peerless well at the going price for natural gas in said pool in harmony with subsisting orders of Commission and in accordance with existing laws of Oklahoma (R. 48, 49).

A hearing was held before Commission on the issues joined by the Peerless Application and the written answer of Cities Service responding thereto. The undisputed and indisputable evidence there adduced disclosed the following facts:

That at the time Peerless tendered gas from its said wells to Cities Service for purchase, and at the time of the hearing of said cause, the going price, market price or weighted average price for natural gas sold in said pool was not in excess of 4¢ or 5¢ per mcf (R. 183, 393, 394, 745, 415). One sale, J. M. McCormick to Cabot Carbon Company, pipe line delivered, was 5¢ per mcf (R. 395). This latter sale was on special emergency order of Commission, Exhibit 10 (R. 550-554). At the time Peerless tendered gas to Cities Service for purchase at 6¢ it was selling gas in the field to another at 4½¢ per mcf (R. 395). At said time Cities Service was purchasing gas from other producers in the pool at 4½¢ pipe line delivered (R. 390, 393, 396, 688-712, 713-744, 795-802). The philosophy of Peerless in s pport of its twofold price-fixing application was explained at the hearing by the attorney for Peerless, in this manner:

"If the Commission, please, if we hadn't asked that the price in the field be fixed in this way, then we would have had to tender the gas at what they say was the going price in the field, in which event we could never have gotten a price established in the field". (R. 81).

The undisputed evidence further disclosed that no waste of gas during the times material herein as defined or contemplated by the Oklahoma Statutes was being committed or imminent in said pool (R. 63-321); that correlative rights of producers, landowners and royalty owners in or to gas as such, were and are being protected, and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma Statutes and subsisting orders of said Commission (R. 63-321). The only evidence even remotely pertaining to waste or lack of conservation of gas in said pool was the testimony of gas men, not qualified as economists, to the effect that the intrinsic value of gas, when compared with fuel oil, coal and other fuels, based upon assumed values, respectively, was 10¢ per mcf at the wellhead in said pool (R. 161, 163-164, 118-119, 282-283), and that in order to prevent waste and conserve gas as a natural resource it was their opinion the minimum price of natural gas in said pool should not be less than 10¢ per mcf (R. 280, 283, 163-164, 118-119) and that any price less than 10¢ was waste (R. 297-298, 163-164, 118-119). No evidence was offered at the hearing or appears in the record disclosing any economic distress in the industry or in the pool or the Hugoton Gas Field.

While the hearing was in progress and prior to the time Peerless rested its case, Peerless and Cities Service

entered into a written stipulation, Exhibit 55 (R. 589-590, 211) for the ratable taking and purchasing of gas by Cities Service from two wells of Peerless in said field, including the well on which its application was based, at a price of 4½¢ per mcf delivered to the pipe line of Cities Service in the pool without prejudice to a final determination of measurement and price by Commission and subject to the provision that Cities Service did not waive any right of objection to the jurisdiction or power of said Commission to make any order concerning the taking of, or the price of, or the basis of measurement of, the natural gas so taken or any gas taken from said pool (R. 589). The taking of the Peerless gas under the stipulation eliminated any question of drainage (R. 90).

After the commencement of the hearing between Peerless and Cities Service and during the course thereof, Commission in executive session at an *ex parte* hearing, by written order, granted the application of the Commissioners of the Land Office of the State of Oklahoma, hereinafter called "Land Office", to intervene in said cause and file petition in intervention therein requesting Commission to fix the price of gas in said field as in the sands and in the common reservoir before being removed (R. 168-176, 574), all of which was done without notice to Cities Service or an opportunity to it to oppose the granting of said application and the filing of said petition in intervention (R. 178-181). Thereafter, Commission by written notice invited all producers and purchasers of gas in the field to appear and participate on a designated date in a hearing upon the petition in intervention filed in said cause by Land Office

and on said date proceeded to a hearing upon said petition in intervention and at the same time and as a part thereof resumed the hearing between Peerless and Cities Service over objection of Cities Service (R. 176, 181, 182). Prior to trial and as a part of its written answer, Cities Service objected to a joint hearing of the judicial and legislative requests of Peerless set forth in its said application, pointing out that the request of Peerless to fix the price and other terms of purchase with respect to the purported dispute between it and Cities Service was judicial in character and required a private adversary hearing and that the request of Peerless to fix the price to be paid by all purchasers of natural gas in said field was legislative in character and required a public hearing (R. 179-180). This objection was overruled and denied (R. 181). Cities Service, upon being advised by the attorney for Commission that the subsisting General Rules of Practice and Procedure promulgated and adopted by Commission were not applicable to a hearing for the determination of the issues of the Peerless application, filed its motion for Commission to inform it, before the hearing commenced, what rules of practice and procedure, if any, it would apply to the hearing of said application (R. 44-45), which motion was denied (R. 64).

During the course of the hearing, over objection of Cities Service, Commission allowed Land Office to actively participate in the trial of the combined judicial and legislative issues, introduce evidence, examine and cross-examine witnesses, and make objections and legal argument (R. 182). Commission also, over objection of Cities Service, permitted

certain royalty owners in the field, through their spokesman, to give testimony, present a petition, and make a speech to Commission without designating to what phase of the case it pertained (R. 101-107, 568). A plebiscite was conducted by said Commission and a great number of royalty owners were polled as to the filing of said petition so presented and the desires of each royalty owner to increase the price of natural gas in said field (R. 112-117). The Conservation Attorney of the Commission, over objection of Cities Service, was permitted to participate actively in the hearing of said combined judicial and legislative cause by offering exhibits, advising Commission on the law, and inquiring of and cross-examining witnesses (R. 332-333). While the proceedings before said Commission were still pending and undetermined the Commission, through its Conservation Attorney, filed petitions in causes pending before the Federal Power Commission stating, among other things, that said Commission was materially interested in price paid for natural gas and interested in securing a greater purchase price for natural gas at the wellhead in said field (R. 475-476).

After filing motion for new trial, which was overruled by Commission (R. 499), Cities Service, as provided by statute, appealed directly to the Supreme Court of Oklahoma the questioned orders of Commission on the grounds, among others, that said orders and the statutes upon which said orders were respectively based, as applied to the operations of Cities Service, contravene the due process, equal protection, and commerce clauses of the Federal Constitution (R. 500, 501, 1-7, 895-927, 931-943). The Supreme Court of Oklahoma upheld the validity of the orders of

Commission as issued, adjudging that said orders, and each of them, and the respective statutes upon which same were based, did not violate either the due process, the equal protection or commerce clause of the Federal Constitution (R. 895-927).

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

I.

The Supreme Court of the State of Oklahoma erred in deciding that Order 19514 and the statute, 52 O. S. 1941, 239, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not deprive Appellant of its property without due process of law or deny to it the equal protection of the laws in contravention to the provisions of Section 1 of the 14th Amendment to the United States Constitution, because:

(a) Said Order 19515 as written, carrying severe penalties for violation thereof, is so vague, indefinite and uncertain, so intermingles findings of fact and law and is subject to so many varying and contradictory interpretations that a producer or a purchaser from a producer cannot in advance of production or purchase with clarity and particularity determine his rights, duties and

obligations thereunder and producers and purchasers must necessarily guess at the meaning thereof and differ as to its application and effect.

(b) Said Order 19514 and the findings in support thereof are contrary to the undisputed and indisputable evidence in the record in that the record shows no waste of gas as defined or contemplated by the Oklahoma statutes was being committed or imminent in said gas field; that correlative rights of producers, landowners and royalty owners in or to gas, as such, were and are being protected and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma statutes and subsisting orders of said Commission, and by reason thereof said order and the findings in support thereof are arbitrary, discriminatory, and demonstrably irrelevant to any pertinent policy the Oklahoma Legislature is free to adopt. In connection therewith said Court should have ordered sustained Appellant's combined demurrer, motion to dismiss, and motion for judgment, on the grounds therein stated.

(c) The record discloses no facts which present a sound or substantial basis for limiting the application of said Order 19514 increasing the price of gas twofold to one gas field to the exclusion of other Oklahoma gas fields, thereby resulting in discrimination and denial of the equal protection of the law.

(d) Said Order 19514 and said statute 52 O. S. 1941, 239, as applied by said Court take Appellant's property without compensation and give it to another without any justifying public purpose or due reciprocity of advantage therefor.

(e) Said statute 52 O. S. 1941, 239, is not ambiguous and no justifiable reason exists authorizing said Court by implication of law or judicial fiat to arbitrarily interpolate into said statute gas price-fixing powers not placed therein by the State Legislature.

(f) Said statute 52 O. S. 1941, 239, sets forth no standard or policy to guide said Commission in exercising any claimed price-fixing powers thereunder and, in the absence thereof, reposes in said Commission an absolute unregulated, unbridled, undefined and arbitrary discretion with respect thereto.

II.

The Supreme Court of the State of Oklahoma erred in deciding that Order 19515 and the statute 52 O. S. 1941, 233, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not deprive Appellant of its property without due process of law or deny to it the equal protection of the laws in contravention to the provisions of Section 1 of the 14th Amendment to the United States Constitution, because:

(a) Omitted and not to be presented.

(b) Said Order 19515 and the findings in support thereof are contrary to the undisputed and indisputable evidence in the record and in connection therewith the Court should have ordered sustained Appellant's demurrer, motion to dismiss, and motion for judgment;

its motion to set aside findings of fact and conclusions of law entered by Commission and substitute therefor certain findings of fact and conclusions of law submitted by Appellant and for judgment; and its motion for new trial, all upon the grounds set forth in said instruments.

(c) Said Commission unlawfully applied retroactively the price and measurement base fixed by its legislative Order 19514 to Appellant by Order 19515 in settling said claimed judicial dispute which arose, if at all, between the parties on past facts and under a particular state statute, 52 O. S. 1941, 233, already in existence, thereby depriving Appellant of vested rights and defenses in the settlement of said purported dispute.

(d) Said Order 19515 and said statute 52 O. S. 1941, 233, as applied to Appellant by said Court require Appellant to discriminate as to price and measurement base in favor of Appellee Peerless Oil and Gas Company and against other sellers of gas in said field in that said order is a special judicial directive leveled solely against Appellant, requiring it to pay said Appellee a price per mcf of natural gas higher than the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the field, which said contracts are specifically authorized by 52 O. S. 1941, 233, and, in addition thereto, by reason thereof, takes Appellant's property without compensation and gives it to said Appellee without any justifying public purpose or due reciprocity of advantage therefor.

(e) Said statute 52 O. S. 1941, 233, sets forth no standard or policy to guide said Commission in acting

thereunder and in effect reposes in said body an absolute unregulated, unbridled, undefined and arbitrary discretion in fixing the price and other terms for purchasing natural gas.

III.

The Supreme Court of the State of Oklahoma erred in holding and deciding said Commission granted Appellant a fair and impartial trial and hearing in accordance with the procedural due process clause of the 14th Amendment, Section 1, Article XIV, United States Constitution:

(a) By refusing to inform Appellant in advance of the trial of the case what rules of practice and procedure would be applied by Commission at the hearing thereof;

(b) By allowing the misjoinder of judicial and legislative matters;

(c) By erroneously consolidating judicial and legislative matters;

(d) By erroneously allowing Commissioners of the Land Office to file petition in intervention and intervene in the case;

(e) By allowing a private citizen to make a statement and speech to the Commission during the course of the trial;

(f) By conducting a plebiscite of land and royalty owners while case was in hearing;

(g) By filing petitions with Federal Power Commission while trial was in progress stating Commission was interested in increasing price of natural gas;

(h) By allowing Commission's conservation attorney to participate and take an active part in trial of private dispute between Appellee Peerless and Appellant;

(i) By admitting incompetent and hearsay evidence and testimony and by making findings contrary to the undisputed and indisputable character of the evidence;

(j) By refusing to segregate and separate the evidence of Appellee Peerless, Land Office and others at the close of their testimony so Appellant could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case;

(k) By Commission's refusing to recognize, apply, and abide by its own subsisting orders.

IV.

The Supreme Court of the State of Oklahoma erred in deciding that Order No. 19514 and the statute 52 O. S. 1941, 239, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not violate the commerce clause, Section 10, Article I, United States Constitution, because said Order 19514 increases the going and market price of gas twofold in said field and is limited solely to one gas field to the exclusion of other gas fields in the State of Oklahoma, and 90% of all gas produced in said field and practically all of Appellant's gas is immediately, without interruption, transported and sold in interstate commerce and by reason thereof said Order 19514

and said statute 52 O. S. 1941, 239, as applied, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant.

V.

The Supreme Court of the State of Oklahoma erred in deciding that Order 19515 and the statute 52 O. S. 1941, 233, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not violate the commerce clause, Section 10, Article I, United States Constitution, because said gas being taken and purchased by Appellant from said Appellee Peerless Oil and Gas Company under subsisting stipulation in effect at the time of the making of said Order 19515 is immediately, without interruption, transported in interstate commerce for resale and said order, being directed solely against Appellant and increasing twofold the price of gas in said field, casts an undue burden upon and discriminates against the interstate operations and business of Appellant.

SUMMARY OF ARGUMENT ON QUESTIONS PRESENTED

I.

The Oklahoma Supreme Court has decided that 52 O. S. 1941, 239, authorized Commission, by implication of law, to fix the price of gas when found necessary to prevent waste and protect the interest of the public and of all those

having a right to produce gas in the pool (R. 895, 910). Price fixing or the price of natural gas is not even mentioned in 52 O. S. 1941, 239. The want of such provisions in a statute to make it constitutional cannot be cured by courts inserting them in judgments under it. *Louisville & N. R. Co.* v. *Central Stockyards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446. The defect in the law cannot be cured by the construction given to the words by the court having final authority to declare their intent. The language of the questioned section (52 O. S. 1941, 239) is plain and unambiguous. The act relates solely to the conservation of natural gas as a commodity and not to the price or proceeds thereof. No court is at liberty to construe language so plain as to need no construction. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 80 L. Ed. 62, 66. To permit a state court of last resort to insert words into a statute not placed therein by the legislature would open an easy method of avoiding the jurisdiction of this Court. *Terre Haute & Indianapolis R. R. Co.* v. *State of Indiana*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129. Such non-federal ground of decision is so colorable and unsubstantial as to be in effect an evasion of the constitutional issue of due process. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 654, 86 L. Ed. 1090, 1095. Courts are without authority either to declare an economic price-fixing policy or, when it is properly declared by the legislature, to override it. *Nebbia* v. *New York*, 291 U. S. 502, 537, 79 L. Ed. 940, 957. The wisdom, need or appropriateness of such legislation, when properly declared, is not the concern either of the courts or of administrative agencies, but primarily rests where the Constitution of Oklahoma

placed it—in the state legislature. Art. IV, Sec. 1, Okla. Const.; *Olsen* v. *Nebraska*, 313 U. S. 236, 246, 85 L. Ed. 1305, 1310.

The Oklahoma Legislature, in 1935, by statute 52 O. S. 1941, 204, in ratifying the provisions of the Interstate Compact to Conserve Oil and Gas, consented to by the Congress of the United States (1935), 49 Stat., Ch. 781, pp. 939-941, declared against the economic policy of gas price fixing. This declaration of policy against price fixing was reiterated by the Legislature in 1936, 1939, and again in 1941. Laws 1936, Ex. Sess., p. 49, Sec. 2; Laws 1939, Ch. 56; Laws 1941, Title 52, Ch. 3. Three separate attempts by interested parties to have the state Legislature expressly confer gas price-fixing powers upon the Corporation Commission of Oklahoma have been rejected by it. 1945 House Journal, 1482, 1573, 1574, 2070, and 2361; 1947 House Journal, 1657, 1788, 1789, 2769, and 2770; 1949 Senate Journal, 177, 416, 449, 473, 474, 549, 587, 588, and 589. The statute, 52 O. S. 1941, 239, construed as authorizing the Corporation Commission of Oklahoma, by necessary implication, to fix a price consideration in the taking and purchasing of gas when found necessary by Commission to prevent waste, protect correlative rights and the interest of the public, does not contain even a semblance of a standard to guide Commission in the exercise of any price-fixing authority. *Panama Rfg. Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570. Compare *Fahey* v. *Mallonee*, 232 U. S. 245, 249, 91 L. Ed. 2030, 2036, 2037. Under the Oklahoma Court's interpretation of the ques-

tioned section, 52 O. S. 1941, 239, Commission is possessed of an absolute, unregulated and undefined discretion to fix any price it deems wise or expedient. The act as construed and applied to Appellant violates the 14th Amendment. *Saia* v. *New York*, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577. The interpretation of the Oklahoma Supreme Court bestows arbitrary gas price-fixing powers upon Commission, has no reasonable relation to a proper exercise of the expressly declared legislative purposes, is contrary thereto and thereby contravenes the due process clause of the Federal Constitution. *Nebbia* v. *New York*, 291 U. S. 502, 537, 79 L. Ed. 940, 957.

II.

Even if this Court rejects the contentions of Appellant under the First Proposition, the undisputed and indisputable evidence in the record clearly shows that the purpose of Order 19514 was not the prevention of waste of gas, current or imminent, as defined by the Oklahoma Statute, nor was it to protect the interest of the public or the correlative rights of those having a right to produce gas as a commodity (R. 63-321). Rather, the apparent objective was, as reflected by Commission's plebiscite (R. 112-117), to confer economic benefits upon royalty owners and certain producers because Commission entertained the view that the price of gas in the Hugoton Field was too cheap (R. 475, 476). There is not one scintilla of evidence in the record of physical waste of gas in the Guymon-Hugoton pool, current or imminent, as defined by statute, in Oklahoma. 52 O. S. 1941, 237; 1945 Sess. Laws, Title 52, Ch. 3, Sec. 3, pp. 156, 157; Appendix F, p. xx, and Appendix F, pp. xxv,

xxvi. The statute, by its term, does not cover economic waste and no evidence of waste, as defined or contemplated by the Oklahoma Statute, appears in the record. The testimony of gas men, not economists, to the effect that the intrinsic value of gas when compared with fuel oil, coal and other fuels, based upon assumed values, respectively, was 10¢ per thousand cubic feet at the wellhead in said pool (R. 161, 163, 164, 118, 119, 282, 283) and the further testimony that in order to prevent waste and conserve gas as a natural resource it was their opinion the minimum price of natural gas in said pool should not be less than 10¢ per thousand cubic feet (R. 280, 283, 163, 164, 118, 119), and their opinion that any price less than 10¢ per thousand cubic feet was waste (R. 297, 298, 163, 164, 118, 119) is wholly incompetent and unsubstantial. *Winans* v. *The N. Y. & Erie R. Co.*, 21 How. 88, 101, 16 L. Ed. 68, 71; 20 Am. Jur., pp. 672, 696, Secs. 799, 829; *Rosenbaum* v. *State*, 131 Ark. 251, 199 S. W. 388, 389, L. R. A. 1918B, 1109. Such opinion evidence is based upon assumption, not facts. It is so highly speculative and remote that it forms no substantial basis in law for price fixing, particularly in the absence of a pertinent legislative declaration so authorizing. On appeal from a state court, when the existence of a federal right or immunity depends upon the appraisal of undisputed, admitted or indisputable facts of record, or where reference to the facts is necessary to a determination of the precise meaning of the federal right or immunity as applied, this Court is free to re-examine the facts as well as the law in order to determine for itself whether the asserted federal right or immunity is to be sustained. *Hooven & Allison* v.

Evatt; 324 U. S. 652, 659, 89 L. Ed. 1252, 1260; *Fiske* v. *Kansas*, 274 U. S. 380, 385, 71 L. Ed. 1108, 1111.

It is plain from the record in this case that Commission has proceeded upon the assumption that it was authorized to increase the price of gas in the field because it believed the price being paid to certain producers and royalty owners was too cheap (R. 475, 476) and that the private benefit of royalty owners and certain producers required Commission, even in the absence of legislative authority, to use its powers as a public body for their pecuniary advantage. Compare *Hood* v. *Du Mond*, 336 U. S. 525, 93 L. Ed. 865. The application thus given to the statute under the relevant facts in the record deprives Appellant of its property for the private use and benefit of royalty owners and certain producers and is a taking of property without due process of law, forbidden by the 14th Amendment. *Chicago, St. P. M. & O. R. Co.* v. *Holmberg*, 282 U. S. 162, 167, 75 L. Ed. 270, 273; *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 429, 79 L. Ed. 949, 963; *Panhandle Eastern Pipe Line Co.* v. *State Highway Comm. of Kansas*, 294 U. S. 613, 79 L. Ed. 1090; *Treigle* v. *Acme Homestead Asso.*; 297 U. S. 189, 197, 198, 80 L. Ed. 575, 580; *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 80, 81 L. Ed. 510, 524.

Order 19514 is limited in its application and effect solely to the Guymon-Hugoton gas pool (R. 11-18). The record shows numerous other gas fields in Oklahoma (Exhibit 68, R. 636A) and that Appellant is a producer and purchaser of gas therein, *id.* There are no practical differences between conditions and circumstances in the Guymon-

Hugoton pool and those in other pools of the state, appearing in this record, that would make price fixing or change of measurement base necessary in one pool to the exclusion of other gas pools in the state (R. 291). The order being limited solely to the Guymon-Hugoton pool to the exclusion of other gas pools in the state, violates the equal protection clause of the Federal Constitution. The classification is unreasonable and arbitrary. *Barbier* v. *Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 155, 41 L. Ed. 668; *Southern R. Co.* v. *Greene*, 216 U. S. 400, 417, 54 L. Ed. 536, 541; *Maryland Coal & Realty Co.* v. *Bureau of Mines of State*, 69 Atl. (2d) 471, 477; *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110, 93 L. Ed. 533, 539; *Met. Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584. The ultimate test is not whether one gas field differs from another gas field but whether the differences between them are pertinent to the subject with respect to which the classification is made; that is, in this case, price and measurement base; *Met. Casualty Ins. Co.* v. *Brownell, supra.* The selective application of a regulation to a particular class denies the equal protection of the law if it rests on grounds wholly irrelevant to the achievement of the regulation's objective. *Kotch* v. *River Port Pilot Commrs.*, 330 U. S. 552, 556, 91 L. Ed. 1093, 1097.

The Legislature, in the last line of the statute 52 O. S. 1941, 239, Appendix F, pp. xxi, xxii, expressly directs Commission in promulgating its regulations "to prevent unreasonable discrimination in favor of any one common source of supply as against another." Where the price of gas in one field is increased and the measurement base changed and in other gas fields of the state is left unregu-

lated the result is conducive to discrimination. It is possible, as condemned by the Oklahoma Court in this case, to take more gas in one place on a low cost than in another place on a higher cost (R. 909, 910). It is clear, therefore, that the price-fixing order of Commission in question here promotes rather than prevents discrimination and therefore contravenes the equal protection clause as well as the due process clause of the Federal Constitution.

III.

As decided by the Supreme Court of Oklahoma, Order 19514 is based upon 52 O. S. 1941, 239, a section of the 1915 Gas Conservation Act (R. 895, 910), see Appendix F, pp. xxi, xxii. For a violation of the order Appellant may be punished as for contempt, 52 O. S. 1941, 241, as in proceedings under Commission's control of public service corporations, Art. IX, Sec. 19, Okla. Const. The offender may be fined by Commission for such contempt, such sum not exceeding $500.00, as the Commission may deem proper, or such sum in excess of $500.00 as may be prescribed or authorized by law; and each day's continuance of the violation constitutes a separate offense, *id.* It may also constitute a misdemeanor, 52 O. S. 1941, 247.

An examination of the Oklahoma Court's opinion in this case discloses that although Appellant contended in the State Court this order was void for vagueness, indefiniteness and uncertainty, that Court neglected to clarify the meaning of the order (R. 895-917). Appellant in its petition for rehearing in the State Court again pointed out to the Court the vagueness, indefiniteness and uncertainty

of this order (R. 931, 932). Compare *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137, 139, 68 L. Ed. 593, 596. A statute (or order) which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Connally* v. *General Construction Co.,* 269 U. S. 385, 393, 70 L. Ed. 322, 329. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no standard or rule at all. *Champlin Rfg. Co.* v. *Corp. Comm.,* 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 463, 71 L. Ed. 1146, 1155.

Must Appellant be required to guess at the meaning of the Commission's order, and the extent to which it may be applied, under dire penalties for failure to correctly comprehend the meaning, extent and operation of the order? What does the Commission mean by the word "take"? Does it mean produce or purchase, or both activities? Must Appellant, in order to obtain gas by purchase, pay its vendors 7¢ per mcf on the prescribed pressure base plus a gathering charge, instead of the contract price of 4½¢ per mcf for gathered gas on a different pressure base or is it required only to pay its vendors for royalty gas on the basis of the order? With respect to Appellant's produced gas that it utilizes in the drilling of wells and as fuel for its field compressors or that it utilizes for other lawful purposes, if the order applies to such gas, how will the Appellant comply with the order? Must Appellant sell all of its gas instead of utilizing a portion of it?

Appellant submits that to require it, in view of its extensive operations and investments and its duty to the public to maintain a constant uninterruptible supply of gas to its markets, to guess at the meaning, extent and operation of Commission's Order 19514, denies Appellant due process of law. *Champlin Rfg. Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Connally* v. *General Construction Co.*, 269 U. S. 385, 393, 70 L. Ed. 322, 329; *United States* v. *Northern Pac. Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243.

IV.

52 O. S. 1941, 233, does not contain any standard at all to guide the Oklahoma Corporation Commission in fixing a price higher than the market, current or going price prevailing in the field at the time and place of the tender, taking or purchase of gas therein, where the parties thereto cannot agree upon the terms thereof. The language of the statute, 52 O. S. 1941, 233, reads, "* * * in case they cannot agree, at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing." To constitute a proper standard within the meaning of the due process clause, the power to be exercised must be canalized so that the exercise of the delegated power will be restrained by banks in a definitely defined or at least some reasonably ascertainable channel. The test is whether the statute is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. *Champlin Rfg. Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v.

Frink Dairy Co., 274 U. S. 445, 463, 71 L. Ed. 1146, 1155; *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 239, 69 L. Ed. 589, 593. Is it possible for Appellant or any reasonably intelligent and prudent person to read this statute and be able therefrom to ascertain the extent of Commission's price-fixing authority?

In the very recent case of *Saia* v. *New York*, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577, this Court in considering a city ordinance having the force of a statute which forbade the use of sound amplification devices except with the permission of the Chief of Police, said, "there are no standards prescribed for the exercise of his discretion." This Court struck down the ordinance as unconstitutional. As shown by the reasoning of this Court in *Fahey* v. *Mallonee*, 332 U. S. 245, 251, 91 L. Ed. 2030, 2037, the purpose of the plain language of this statute is clearly disclosed to authorize any price or terms of purchase or taking Commission would propose or prescribe as wise and beneficent in settling the claimed dispute between Appellant and Appellee Peerless Oil and Gas Company. Apparent it is that this statute contains no semblance of a standard or guide for Commission to follow in the exercise of any price-fixing authority. *Panama Rfg. Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States*, 294 U. S. 495, 79 L. Ed. 1570. It is therefore void because it confers upon Commission arbitrary, capricious, and unreasonable gas price-fixing powers in violation of the due process clause of the 14th Amendment. *Nebbia* v. *New York*, 291 U. S. 502, 525, 539, 78 L. Ed. 940, 947.

The undisputed evidence in the record shows that at the time Peerless tendered gas from its wells to Cities

Service for purchase there existed in said field subsisting basic Order 17867 of Commission (R. 543-549). This order as construed by the Supreme Court of Oklahoma (*Application of Moran*, 200 Pac. [2d] 758) required Peerless, in order to have its acreage considered or held to be producing acreage, to tender in good faith the gas from its wells to Cities Service at the going price in the field (R. 543).

It cannot be disputed that at said time there was in full force and effect Revised Maximum Price Regulation No. 436 (R. 748-790) promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended; 50 U. S. C. A. 901, *et seq.*, making it unlawful for Peerless to tender its gas to Cities Service at a price more than 4¢ per thousand cubic feet (R. 745-747).

The Commission, in this case, as recognized by the Supreme Court of Oklahoma (R. 905), has promulgated its legislative order (R. 11-18) and applied it retroactively to Appellant by its judicial order (R. 19-29). Compare *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158. That this cannot be done to the detriment of vested property rights and existing defenses accruing before the promulgation of Order 19514 is well settled. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 198, 80 L. Ed. 575, 581; *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107; *Fidelity & Deposit Co. of Maryland* v. *Arenz*, 290 U. S. 66-68, 78 L. Ed. 176, 178. The statutes in this case do not authorize Commission to issue retroactive orders. The principle against retroactive legislation is strictly applicable to statutes which have the effect of creating an obligation. An administrative regulation is subject to the rule equally

with the statute and accordingly the legislative field price-fixing order of Commission cannot be applied retroactively as was done by Commission in Order 19515, unless the statute specifically so authorizes. *Miller* v. *United States*, 294 U. S. 435, 439, 79 L. Ed. 977, 981.

V.

For many years this Court's decision in the case of *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, clearly pointing out the distinction between a judicial and legislative inquiry, has been recognized and followed by the various state courts. Oklahoma has been no exception. *Associated Industries* v. *Industrial Welfare Comm.*, 185 Okla. 177, 90 Pac. (2d) 899, 914. With respect to procedural due process, this Court has said:

> *"If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned was lacking, the proceeding is void and must be set aside"* (Italics supplied). *Kessler* v. *Strecker*, 307 U. S. 22, 34, 83 L. Ed. 1080, 1090.

Compare *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433. The Oklahoma Court, except in the case at bar, has recognized these requirements of procedural due process. *Skinner* v. *State*, 189 Okla. 235, 115 Pac. (2d) 123.

The undisputed evidence in the record in this case shows that Commission refused to inform Appellant in advance of the hearing what rules of practice and procedure

it would follow and apply (R. 64). It allowed the misjoinder of judicial and legislative matters and consolidated same for hearing at the same time (R. 179, 180, 181). It allowed Commissioners of the Land Office to intervene in the proceedings (R. 168, 176, 178, 181, 574) and conducted a plebiscite of land and royalty owners while the case was in hearing (R. 112-117). It filed petitions with the Federal Power Commission while the hearing was in progress, stating Commission was interested in increasing the price of natural gas in the pool (R. 475, 476). Commission allowed its Conservation Attorney, as well as the Attorney for Commissioners of the Land Office, to take an active part in the hearing of the private dispute between Peerless and Cities Service (R. 182, 332, 333); admitted incompetent, irrelevant and hearsay evidence and testimony (R. 161, 163, 164, 118, 119, 282, 283). It refused to segregate and separate the testimony so Cities Service could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case (R. 339). It refused to recognize, apply and abide by its own subsisting orders (R. 543, 548).

By reason of all these things Appellant asserts it has been denied procedural due process of law in accordance with the provisions of the 14th Amendment at the hearing before Commission leading to the issuance of Order 19515. Compare *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1102; *Morgan* v. *United States*, 304 U. S. 1-15, 82 L. Ed. 1129, and cases there cited.

VI.

In the light of the undisputed evidence in the record, it is apparent that the practical effect of Order 19514 is to prohibit the gas in the Guymon-Hugoton pool from being the subject of interstate commerce unless local economic interests are aided to an extent of practically twofold the going price thereof. *Hood* v. *Du Mond*, 336 U. S. 657, 93 L. Ed. 682.

In the case at bar the nature and effect of the interference with interstate commerce by the State of Oklahoma is similar to that which would have resulted from the conservation measure attempted by Oklahoma in the case of *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 260; 55 L. Ed. 716, 728. There the avowed conservation measure would have prohibited natural gas from being the subject of interstate commerce, for the purpose of bestowing benefits upon the inhabitants of the state. Here, under the guise of the prevention of waste of natural gas the State of Oklahoma seeks, not necessarily to bar, but to heavily burden interstate commerce, for the purpose of bestowing pecuniary benefits upon a very small and selected segment of its population.

Practically all of the gas Appellant produces and purchases goes into interstate commerce (R. 389-390). The effect on interstate commerce is apparent; the harm to the nation immediate and clear. Compare *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1; 73 L. Ed. 147, 154; *Pennsylvania* v. *West Virginia*, 262 U. S. 553; 67 L. Ed. 1117; *Freeman* v. *Hewett*, 329 U. S. 249, 91 L. Ed. 265. The

orders as applied to Appellant under the undisputed evidence in the record unduly burden and discriminate against interstate commerce and the interstate operations of Appellant. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 79 L. Ed. 1032; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

ARGUMENT

I.

Is the Supreme Court of Oklahoma lawfully empowered within the meaning of the provisions of the 14th Amendment, as applied to Appellant, to interpolate into 52 O. S. 1941, 239, an unambiguous state act pertaining solely to the conservation of natural gas as a commodity, a price-fixing policy with respect thereto where the State Legislature has not either declared any such policy or provided in the act any standard to guide a state commission in the exercise thereof?

This proposition presents the narrow question of what the Oklahoma Legislature did; not what it could do. Courts are without authority either to declare an economic price-fixing policy or, when it is properly declared by the Legislature, to override it. *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957. The wisdom, need, or appropriateness of such legislation, when properly declared, is not the concern either of the courts or of administrative agencies but primarily rests where the Constitution of Oklahoma placed it—in the State Legislature. Art. IV, Sec. 1, Okla. Const.; *Olsen* v. *Nebraska*, 313 U. S. 236, 246, 85 L. Ed. 1305, 1310. The language of the questioned section (52 O. S. 1941, 239), as well as the entire Act of 1915 of which it is a part, is plain and unambiguous. The Act relates solely to the conservation of natural gas as a commodity and not to the price or proceeds thereof. There is no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes, and where the words are sufficient in and of themselves to determine the purpose of the legislation, the plain

meaning will be followed by the courts. *United States* v. *American Trucking Assn.*, 310 U. S. 534, 543, 84 L. Ed. 1345, 1350, 1351; *Ex Parte Joseph Collett*, 337 U. S. 51, 61, 93 L. Ed. 1207, 1211. No court is at liberty to construe language so plain as to need no construction or to refer to committee reports or administrative interpretations where there can be no doubt of the meaning of the words used. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 80 L. Ed. 62, 66.

From the plain language of this Gas Conservation Act it is apparent that the Oklahoma Legislature has not therein declared any price-fixing policy with respect to natural gas. Price fixing or the price of natural gas is not even mentioned in the entire Act. The want of such provisions in a statute to make it constitutional cannot be cured by courts inserting them in judgments under it. *Louisville & N. R. Co.* v. *Central Stockyards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446. The defect in the law cannot be cured by the construction given to the words by the court having final authority to declare their intent. *Louisville & N. R. Co.* v *Central Stockyards Co., supra.* See dissenting opinion of Justice Gibson in the case at bar (R. 927). To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Terre Haute & Indianapolis R. R. Co.* v *State of Indiana*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129. Of course, if the language of the statute is ambiguous or seemingly not plain, so as to justify construing the same, a State Court's interpretation of the statute may be justified and binding upon this Court. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 219, 58 L. Ed. 1284, 1286. Yet where the construction of the statute

by a state court is so colorable and unsubstantial as to be in effect an evasion of the constitutional issue of due process or an attempt on its part to avoid the jurisdiction of this Court, the interpretation is not binding upon this Court. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 654, 86 L. Ed. 1090, 1095; *Radio Station W. O. W., Inc.* v. *Johnson,* 326 U. S. 120, 129, 89 L. Ed. 2092-2100. The Oklahoma Supreme Court's construction of the statute in question may not be utilized to cloak an infringement of the rights of Appellant under the Federal Constitution. *Bain Peanut Co.* v. *Pinson,* 382 U. S. 499, 501, 75 L. Ed. 482, 490, 491. There is a vital and material difference between interpolating into a statute language not placed therein by the Legislature and the construing of a statute where the meaning thereof is not plain, as pointed out by Justice Holmes. *International Harvester Co.* v. *Kentucky, supra.* In the case of *Interstate Commerce Comm.* v. *Cinn. N. O. & T. P. R. Co.,* 167 U. S. 479, 494, 495, 505, 42 L. Ed. 243, 253, this Court had before it a controversy over the asserted power of the Interstate Commerce Commission to fix railroad rates under the Act of 1887. The Act there under consideration provided that "all charges * * * shall be just and reasonable"; and further provided that "* * * the Commission is hereby authorized and required to execute and enforce the provisions of this Act." The question debated was whether the Act vested in the Commission the power and duty to fix rates. This Court said, on page 494, U. S. Reports:

> "The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties."

In disposing of Commission's contentions, the Court said, on pages 494, 495, of the opinion:

> "*The grant of such a power is never to be implied.* The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly of commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, *that no just rule of construction would tolerate a grant of such power by mere implication.* Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many states of this Union" (Italics supplied).

This is exactly the same situation as presented by the statute here under consideration, except that the statute here under examination does not even mention reasonable charges or prices. On page 505, this Court further said:

> "The power to prescribe a tariff of rates for carriage by common carrier is a legislative and not an administrative or judicial function, * * * is a power of supreme delicacy and importance * * *. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, *and, if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction but clear and direct*" (Italics supplied).

Compare *Sunshine Dairy* v. *Peterson*, 183 Ore. 305, 193 Pac. (2d) 543.

This Court, in the exercise of its appellate jurisdiction over cases appealed from state courts, takes judicial notice of whatever was a matter of law or fact before the court from which the appeal is taken, and whatever was a matter of fact before the Supreme Court of Oklahoma is a matter of fact before this Court; *Hanley* v. *Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, 537. The Supreme Court of Oklahoma takes judicial notice of legislative proceedings; *Dyer* v. *Shaw*, 139 Okla. 165, 281 Pac. 776, 777. On March 14, 1945, House Bill No. 431 was introduced in the Oklahoma Legislature by Hughes of the House representing Texas County, in which county is located the Guymon-Hugoton Gas Field; 1945 House Journal 1425 (Appendix A). This bill, in language open to no misconstruction, but clear and direct, would have conferred upon Commission gas price-fixing powers (Appendix A). The bill failed to pass; 1945 House Journal 1482, 1573, 1574, 2070, 2361. Again on April 2, 1947, House Bill No. 439 was introduced in the Oklahoma Legislature by Field and Musgrave of the House and Leonard of the Senate; 1947 House Journal 1604 (Appendix B). Field of the House and Leonard of the Senate represented an area of the State including Texas County and the Guymon-Hugoton Gas Field. This bill, in clear and concise language, would have conferred upon the Commission gas price-fixing powers (Appendix B). It failed to pass; 1947 House Journal 1657, 1788, 1789, 2769, 2770. In 1949, another effort was made to confer upon Commission gas price-fixing powers (Appendix C). On February 3, 1949, Senate Bill 121 was introduced in the Oklahoma Legislature by the same persons who introduced the bill in 1947; 1949 Senate Journal 172. This bill would have clearly con-

ferred upon Commission gas price-fixing powers (Appendix C). This bill also failed to pass; Senate Journal 177, 416, 449, 473, 474, 549, 587, 588, 589. An unsuccessful attempt by interested parties to obtain express authority from the Legislature indicates the previous absence of implied authority. *Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 351, 352, 85 L. Ed. 881, 884. Since price fixing is restrictive of a free economy, the rights claimed to be attached thereto must be strictly construed; *United States* v. *Masonite Corp.*, 316 U. S. 265, 280, 86 L. Ed. 1461, 1476.

It is academic law that administrative agencies are purely creatures of legislation without inherent or common law powers. *Sutherland Statutory Constr.*, 3rd Ed., Horack, Vol. 3, Sec. 6603. In dealing with statutes conferring power upon the Corporation Commission, the Oklahoma Supreme Court, except in the instant case, has consistently limited the power and authority of the Corporation Commission of Oklahoma to powers plainly granted to it by the Legislature. *Application of Central Air Lines* (1947), 199 Okla. 300, 185 Pac. 919. In the opinion the Court said:

> "Under this construction, the expressed delegation of what is to be included leaves no room for enlargement through implication" (Pacific citation 924).

Compare *Chicago, R. I. & P. Ry. Co.* v. *State* (1932), 158 Okla. 57, 12 Pac. (2d) 494, 497; *Sterling Rfg. Co.* v. *Walker* (1933), 165 Okla. 45, 25 Pac. (2d) 312, 320, 321; *Wilcox Oil & Gas Co.* v. *Walker* (1934), 169 Okla. 33, 32 Pac. (2d) 1044, 1046; *Worley* v. *French* (1938), 184 Okla. 116, 85 Pac. (2d) 296; *Board of Education of Okla. City* v. *Cloudman* (1939), 185 Okla. 400, 92 Pac. (2d) 837; *Tharel*

v. *Board of County Commrs. of Creek County* (1940), 188 Okla. 184, 107 Pac. (2d) 542; *Pannell* v. *Farmers Union Cooperative Gin Assn.* (1943), 192 Okla. 652, 138 Pac. (2d) 817, 820; *Yochman* v. *County Election Board of Creek County et al.* (1947), 198 Okla. 588, 180 Pac. (2d) 831. While it is recognized that a state Supreme Court can reverse its position and change its former local law rule, the foregoing cases lend support to Appellant's contention that in the instant case the Court's construction is the utilization of local grounds of decision to cloak an infringement of rights of Appellant under the Federal Constitution. *Bain Peanut Co.* v. *Pinson*, 382 U. S. 499, 501, 75 L. Ed. 482, 490, 491.

The Oklahoma Supreme Court in its opinion in the case at bar said:

> "Commission has heretofore exercised its power of fixing prices at which natural gas may be produced and taken. As early as 1920, after the prescribed notice and hearing, the Commission fixed the price of 9¢ per M. C. F. for gas in the Cushing Field and in 1944, acting specifically in view of the national emergency, the Commission, after notice and hearing, authorized the taking of natural gas for the manufacture of carbon black, but fixed the price to be paid for the gas so produced and used. And it was also specified that the continued effectiveness of the permit should depend on the maintaining of the fixed price" (R. 912).

The carbon black order appears in the record, Exhibit 10 (R. 550-554). The Cushing order referred to was not introduced in evidence and does not appear anywhere in the record, the Court apparently taking judicial notice thereof. For the convenience of the Court, the Cushing order is set

out in full in Appendix D. The Court concluded, because Commission had by such orders at or near the time of enactment of the statute in question, 52 O. S. 1941, 239, placed a construction on the statute with respect to price fixing which had long been acquiesced in, that such construction afforded a just medium for its judicial interpretation of price-fixing authority into the statute (R. 912-913). Even a superficial examination of the orders will reflect that neither of the orders concerns or was based upon the statute here under examination, nor do the orders relate to the production of gas. The Cushing order is clearly *quasi judicial* in character. *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158. The same is true of the carbon black order. A careful reading of the Cushing order reflects from its clear language that the jurisdiction Commission decided it possessed was based upon the public utility statutes of Oklahoma, 52 O. S. 1941, 151, *et seq.*, not involved in this action, and the dispute statute, 52 O. S. 1941, 233, not dealing with field price, the constitutional validity of which latter statute is also being questioned in this appeal and will be more fully examined and discussed hereafter in this brief. The carbon black order plainly shows on its face that it was a war emergency order based upon no statute; certainly not upon 52 O. S. 1941, 239. When this Court has completed an examination of the record and of the two orders relied upon by the Oklahoma Court in its opinion, it will undoubtedly be convinced that Commission has at no time since the enactment of the 1915 Conservation Act, of which 52 O. S. 1941, 239, is a part, interpreted the Act as authorizing gas price fixing by Commission for the purpose of preventing waste or protecting

the public interest and correlative rights. In a most recent case, *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513, 514, 93 L. Ed. 1499, 1509, this Court pointed out that failure of Commission to use an important power for so long a time indicates that the Commission did not believe the power existed, clearly indicating in the light of that history a court should not by an extravagant, even if abstractly possible mode of interpretation, push powers into a statute not placed therein by the Legislature. This reasoning is reinforced by the unsuccessful attempts, in 1945, 1947 and 1949, of interested parties to secure gas price-fixing powers from the Legislature for Commission (Appendices A, B, C). This Court should not, however, overlook or disregard the fact that the plain language of the statute relied upon does not grant Commission price-fixing powers. Where this is true no amount of administrative interpretation is binding upon the courts. *Texas & P. R. Co.* v. *United States*, 289 U. S. 627, 640, 77 L. Ed. 1410, 1423. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315, 77 L. Ed. 796, 807, is a case where this Court clearly indicated that administrative construction comes into being only where the language of the statute is indefinite and doubtful. In *Alaska Steamship Co.* v. *United States*, 290 U. S. 256, 264, 78 L. Ed. 302, 306, this Court said:

> "But in any case there is no ambiguity or uncertainty in the statute with respect to the point urged by the Government, and, in carrying it out as written, there is no administrative difficulty which would call for construction. The rulings * * * rest upon a proposition so plainly contrary to law and so plainly in con-

flict with the statute as to leave them without weight as administrative constructions of it."

The ruling of Commission and the approval of the Oklahoma Court thereof are so plainly contrary to law, so plainly in conflict with the statute with respect to the point of price fixing as to leave any administrative construction without weight. Compare *Mathews* v. *Mathews*, 186 Okla. 245, 96 Pac. (2d) 1054.

Statutes should be construed, so far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of administrative officers, to the end that ours may continue to be a government of written laws rather than one of official grace; *United States* v. *Northern Pacific Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243. May Appellant here inquire whether it or any reasonably prudent and intelligent person could read the statute in question, 52 O. S. 1941, 239, and fairly forecast the extent of Commission's gas price-fixing powers thereunder? Appellant submits that the interpretation of the statute by the Oklahoma Supreme Court leaves the price of gas to the unlimited and unrestricted discretion of Commission and by reason thereof is arbitrary and denies Appellant, as well as other producers and purchasers, due process of law. *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957.

The Oklahoma Legislature, in 1935, by statute 52 O. S. 1941, 204, in ratifying the provisions of the Interstate Compact to Conserve Oil and Gas, consented to by the Congress of the United States (1935), 49 Stat., Ch. 781, pp.

939-941, declared against the economic policy of gas price fixing. In successive Acts the provisions of the Compact have been extended with the consent of Congress (1937), 50 Stat., Ch. 572, pp. 617-619; (1939), 53 Stat., Ch. 337, pp. 1071-1074; (1941), 55 Stat., Ch. 400, pp. 666-669; (1943), 57 Stat., Ch. 194, pp. 383-387. The Oklahoma Legislature, in 1936, 1939, and again in 1941, reiterated its policy against gas price fixing; Laws 1936, Ex. Sess., p. 49, Sec. 2; Laws 1939, Ch. 56; Laws 1941, Title 52, Ch. 3. The purpose of the Compact, according to the plain language of Article V thereof, is "limited to the purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations." The construction of such a Compact, sanctioned by Congress, involves a federal question and the meaning thereof, including the public policy of the respective compacting states, is, in the final analysis, for this Court to determine; *Delaware River Joint Toll Bridge Comm.* v. *Colburn*, 310 U. S. 419, 427, 84 L. Ed. 1287, 1289. Compare *Stanley et al.* v. *Mowery* (Okla., 1949), 207 Pac. (2d) 277.

The statute in question, 52 O. S. 1941, 239, construed as authorizing Commission by necessary implication to fix a price consideration in the taking and purchase of gas when found necessary by Commission to prevent waste, protect correlative rights and the interest of the public, contains no semblance of an intelligible or adequate standard to guide Commission in the exercise of any price-fixing authority. *Panama Rfg. Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570. The Act here under examination, as construed by the Oklahoma Supreme Court, is not

merely to deal with practices which offend against existing laws that could be the subject of judicial condemnation without further legislation or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose of the statute as interpreted by that Court is clearly disclosed to authorize new and controlling regulations by Commission which would embrace what the formulators, the Commission, would propose or prescribe as wise and beneficent measures for the government of the gas industry. Compare *Fahey* v. *Mallonee*, 332 U. S. 245, 249, 91 L. Ed. 2030, 2036, 2037. The decision of the Oklahoma Supreme Court that the prevention of waste, protection of the interest of the public and of correlative rights are standards to guide Commission in fixing the price of gas is clearly false logic and untenable. The prevention of waste, the protection of the interest of the public and of correlative rights are clearly legislative objectives or policies with respect to the conservation of gas as a natural resource or commodity; *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 69, 81 L. Ed. 510, 518. To constitute a standard the power must be canalized so that the exercise of the delegated power will be restrained by banks in a definitely defined or at least reasonably ascertainable channel. The test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. *Champlin Rfg. Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463, 464, 71 L. Ed. 1146, 1155; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239, 69 L. Ed. 589, 593. There is not a semblance of a standard in the statute.

For instance, the Legislature does not even require Commission to fix an equitable, fair or reasonable price. Under the Oklahoma Court's interpretation of the Act, Commission is possessed of an absolute, unregulated and undefined discretion to fix any price it deems wise or expedient. The Act as construed and applied to Appellant violates the 14th Amendment; *Saia* v. *New York*, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577. Even a cursory examination of the decision of the Oklahoma Supreme Court, in the light of the plain language of the statute, will reflect that the non-federal ground of its decision is so colorable and unsubstantial as to be in effect an evasion of the constitutional issue of due process and an attempt on its part to avoid the jurisdiction of this Court. *Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758; *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 654, 86 L. Ed. 1090, 1095; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540, 74 L. Ed. 1023, 1030; *Radio Station W. O. W., Inc.* v. *Johnson*, 326 U. S. 120, 129, 89 L. Ed. 2092, 2100. The interpretation of the Act by the Supreme Court of Oklahoma bestows arbitrary gas price-fixing powers upon Commission, has no reasonable relation to a proper exercise of the expressly declared legislative purposes, is contrary thereto, and thereby contravenes the due process clause of the Federal Constitution; *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957.

II.

If the Corporation Commission is lawfully empowered by 52 O. S. 1941, 239, for the purpose of conservation and in the public interest to fix a minimum price for natural gas in Oklahoma; does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a producer and purchaser of natural gas prove facts legally sufficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19514, make the findings it did in support thereof, and limit the effect and operation of said Order to the Guymon-Hugoton Field to the exclusion of other Oklahoma gas fields?

For purposes of Appellant, here, it is assumed that the construction and coverage of the statute as declared by the highest court of the state fixes its meaning for the purpose of determining its constitutionality by this Court and that this Court may reject Appellant's contentions under Proposition I. It may therefore be stated that the Oklahoma Supreme Court decided, in the case at bar, that 52 O. S. 1941, 239, authorized Commission to fix the price of gas when found necessary to prevent waste or protect the interest of the public and of all those having a right to produce gas in the pool (R. 895, 910); that the Court also based authority of Commission solely on 52 O. S. 1941, 239, and said Commission was limited in its use of price-fixing powers under the statute to the effecting of these expressed purposes (R. 910-911). In other words, under the Oklahoma Court decision, if the record in this case and the findings of Commission show a purpose other than the prevention of waste, protection of the interest of the public

or safeguarding correlative rights of producers, then the price-fixing order here under examination is clearly unauthorized and invalid. The immediate problem facing this Court necessitates a review of the evidence and Commission's findings purportedly based thereon to ascertain whether the order was issued to prevent waste, protect the interest of the public and preserve correlative rights of producers. All other findings and evidence are therefore irrelevant because the Oklahoma Supreme Court by its interpretation of the statute relied upon has limited the use of price fixing to those certain specified purposes. *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486, 497, 91 L. Ed. 1621, 1630. On appeal from a state court, when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed, admitted or indisputable facts of record, or where reference to the facts is necessary to a determination of the precise meaning of the federal right or immunity as applied, this Court is free to re-examine the facts as well as the law in order to determine for itself whether the asserted federal right or immunity is to be sustained. *Hooven & Allison* v. *Evatt*, 324 U. S. 652, 659, 89 L. Ed. 1252, 1260; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259; *Fiske* v. *Kansas*, 274 U. S. 380, 385, 71 L. Ed. 1108, 1111. Compare *Pennekamp* v. *Florida*, 328 U. S. 331, 345, 90 L. Ed. 1295, 1303; *Oyama* v. *California*, 332 U. S. 633, 636, 92 L. Ed. 249, 254.

When Order 19514 and the pertinent findings are tested in the light of the undisputed and indisputable evidence it clearly appears that the reason for the promulgation of the order was not the prevention of waste of gas, current or

imminent, as defined by the Oklahoma Statutes, nor was it to protect the interest of the public or the correlative rights of those having a right to produce gas. Rather, the apparent objective was as reflected by Commission's plebiscite (R. 112-117) to confer economic benefits upon royalty owners and certain producers because Commission entertained the view that the price of gas in the Hugoton Field was too cheap (R. 475-476). If, as testified to by witnesses of Peerless not qualified as economists, the taking of gas from the field at any price less than 10¢ per mcf was waste (R. 118, 119, 163-164, 282, 283), the order of Commission fixing a price lower than 10¢ is certainly evidence that the intent and purpose of the order was not the prevention of waste. There is not one iota of evidence in the record of physical waste of gas, current or imminent, as defined by statute in Oklahoma, 52 O. S. 1941, 237; 1945 Sess. Laws, Title 52, Ch. 3, Sec. 3, pp. 156-157; Appendix F. On the contrary, the undisputed evidence shows no physical waste (R. 278-313, 472-474, 476-482, 617). The statute by its terms does not cover economic waste and no evidence of waste as defined by the Oklahoma Statute appears in the record. The opinion evidence of gas men, not economists, is based upon assumption, not facts. It is so highly speculative and remote that it forms no substantial basis in law for price fixing, particularly in the absence of a pertinent legislative declaration.

To permit an expert to define the ordinary meaning of the word "waste" and apply that opinion without fact basis is, to say the least, a plain usurpation of the powers of the court, 20 Am. Jur. 696, Sec. 829. Even lawyers are

not permitted to so testify, 20 Am. Jur. 672, Sec. 799. This Court has given recognition to this well-established and long recognized rule. *Winans* v. *The N. Y. & Erie R. Co.* (1859), 21 How. 88, 101, 16 L. Ed. 68, 71. In an excellent opinion on this very question, it is said:

> "It is a familiar rule, without exception, that the opinion of a witness not founded on science or in relation to any special business, art, or trade requiring peculiar knowledge, but given purely as the witness' theory concerning an issue of morals or duty, is inadmissible, whether such opinion be by a professional or non-professional witness." *Rosenbaum* v. *State,* 131 Ark. 251, 199 S. W. 388, 389, L. R. A. 1918B, 1109.

At the time of the hearing and issuance of Commission's gas price-fixing Order 19514 Appellant was the owner of subsisting gas purchase contracts prescribing, among other things, the price and measurement base for purchased gas (R. 688-744, 795-802), as well as subsisting oil and gas lease contracts providing that gas royalty shall be paid upon a basis of the market value or market price of the gas, Exhibit 54 (R. 58, 390). Commission's order increases twofold the going, current or market price of gas in the Guymon-Hugoton Gas Field (R. 183, 393, 394, 745, 417). Valid contracts are property within the meaning of the 14th Amendment, whether the operator be a private individual, a municipality, a state, or the United States; *Lynch* v. *United States,* 292 U. S. 571, 579, 78 L. Ed. 1434, 1440. The due process and equal protection clauses of the 14th Amendment are applicable to corporations; *Santa Clara County* v. *Southern Pacific Ry. Co.,* 118 U. S. 394, 397, 30 L. Ed. 118; *Minn. & S. L. Ry. Co.* v. *Beckwith,* 129

U. S. 26, 28, 32 L. Ed. 585, 586; *Lecraft* v. *The Texas Company*, 281 Fed. 918, 921, error dismissed, 262 U. S. 732, 67 L. Ed. 1205.

To justify the state in interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from private persons require such interference, and second, that the means employed are reasonably necessary for the accomplishment of the purpose and are not unduly oppressive upon individuals; *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. Ed. 385, 388; *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 69, 70, 81 L. Ed. 510, 518. To put it another way, the guaranty of due process demands that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. Compare *Liggett Co.* v. *Baldrige*, 278 U. S. 105, 113, 73 L. Ed. 204, 208, 209. A regulation valid for one sort of business or in given circumstances may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts; *Nebbia* v. *New York*, 291 U. S. 502, 525, 78 L. Ed. 940, 950. It is plain from the record in this case that Commission has proceeded upon the assumption that it was authorized to increase the price of gas in the field because it believed the price being paid to certain producers and royalty owners was too cheap (R. 475-476), and that the private benefit of royalty owners and certain producers required Commission, even in the absence of legislative authority, to use its powers as a public body for their pecuniary advantage. Compare *Hood* v. *Du Mond*, 336 U. S. 525, 93 L. Ed. 865. The appli-

cation thus given to the statute under the relevant facts in the record deprives Appellant of its property for the private use and benefit of royalty owners and certain producers and is a taking of property without due process of law, forbidden by the 14th Amendment; *Chicago, St. P. M. & O. R. Co.* v. *Holmberg,* 282 U. S. 162, 167, 75 L. Ed. 270, 273. Notwithstanding the holding of the Oklahoma Supreme Court that the public interest by way of gross production tax was affected, this Court has specifically decided that when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. *Nashville C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 429, 79 L. Ed. 949, 963. Compare *Panhandle Eastern Pipe Line Co.* v. *State Highway Comm. of Kansas,* 294 U. S. 613, 79 L. Ed. 1090. In *Treigle* v. *Acme Homestead Asso.,* 297 U. S. 189, 197, 198, 80 L. Ed. 575, 580, this Court clearly pointed out:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.
>
> "As we have pointed out, the questioned sections deal only with private rights, and are not adapted to the legitimate end of conserving or equitably administering the assets in the interest of all members. They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the Appellant's contract and arbitrarily

deprive him of vested property rights without due process of law."

This Court has many times warned that one person's property may not be taken for the benefit of another private person without justifying public purpose, even though compensation be paid. *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 80, 81 L. Ed. 510, 524.

In the face of this order increasing twofold the price of natural gas in the field and considering Appellant's subsisting gas purchase contracts and oil and gas leases (R. 11-18, 688-744, 795-802), as well as the apparent purpose underlying the issuance of Commission's price-fixing order, it is difficult to perceive how Appellees can logically contend that the pecuniary injury to Appellant is so remote, contingent and speculative as to be outside the protection of the 14th Amendment; *Gange Lbr. Co.* v. *Rowley*, 326 U. S. 295, 305, 90 L. Ed. 85, 92. The impact of the order is direct; the injury to Appellant as it appears from the record is substantial and certain; the harm is immediate, and Appellant is entitled to the protection of the due process clause against the exercise of such arbitrary and capricious powers of Commission as is evidenced by the record in this case; *Nebbia* v. *New York*, 291 U. S. 502, 525, 78 L. Ed. 940, 950.

Order 19514 of the Commission commands that no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field at a price at the wellhead of less than that prescribed and on a measurement base different from that provided by the order (R. 11-18). Certainly this language plainly shows, particularly

in view of the relevant facts in the record, that the order limits and restricts the production of gas in said field for the purpose of fixing the price thereof. The Legislature of Oklahoma, 1935, by statute, 52 O. S. 1941, 204, in first ratifying the Interstate Compact to Conserve Oil and Gas, declared its policy in this language:

> "It is not the purpose of this Compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof." Art. V, Compact.

Before the expiration of the Oklahoma Legislature's ratification of the Compact, the Legislature reactivated its price-fixing declaration on three different occasions; Laws 1936 Ex. Sess., p. 49, Sec. 2; Laws 1939, Ch. 56; Laws 1941, Title 2, Ch. 3. Concededly, in Oklahoma, the Legislature is primarily the judge of the enactment. Every possible presumption is in favor of its validity and, although the Court may hold views inconsistent with the wisdom of the law, or the policy of the Legislature therein declared, it may not annul the law unless palpably in excess of legislative power. *Herrin* v. *Arnold*, 183 Okla. 392, 82 Pac. (2d) 977; *Jack Lincoln Shops* v. *State Dry Cleaners' Board*, 192 Okla. 251, 135 Pac. (2d) 332; *Appl. of Richardson*, 199 Okla. 406, 184 Pac. (2d) 642. This rule is certainly applicable to the statute, 52 O. S. 1941, 204, adopting and ratifying the Interstate Compact to Conserve Oil and Gas. Although Appellant pointed this out to the Oklahoma Court in its brief in the State Court when discussing its first proposition, as set forth verbatim in the Court's opinion (R. 899), the Oklahoma Supreme Court, in its opinion, failed to even

mention or consider the contention thus made. If the State of Oklahoma through its judiciary may accept those provisions of the Interstate Compact to Conserve Oil and Gas that it chooses and overlook or reject those that do not suit its convenience or purpose, then other states may do likewise. That this would result in confusion and a nullifying of the plain purpose of the Compact is self-evident. Without doubt such a contemplated situation led this Court to conclude that the construction of such a compact sanctioned by Congress was a federal question, the interpretation of the compact in the final analysis being a matter for this Court. *Delaware River Joint Toll Bridge Comm.* v. *Colburn*, 310 U. S. 419, 427, 84 L. Ed. 1287, 1289.

State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law, except where their judgments collide with rights secured by the Federal Constitution; *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486, 497, 91 L. Ed. 1621, 1629, 1630. Since the Supreme Court of Oklahoma has confined, by its opinion, the gas price-fixing power of Commission to 52 O. S. 1941, 239, and limited Commission in its use of such price-fixing power to the prevention of waste, protection of the interest of the public and safeguarding correlative rights of producers, it would be wholly irrelevant and unnecessary for Appellant to fully analyze, discuss and consider the other immaterial findings of Commission and the evidence claimed to be in support thereof. While Commission by some of

its findings has said that Cities Service is a common carrier, a common purchaser, and a public utility (R. 17, 26), it is quite evident that such findings do not either as a matter of logic or under the decision of the Oklahoma Supreme Court afford any basis or justification for the field price-fixing order of Commission. The authority for the issuance of the order is clearly founded, according to the interpretation of the Oklahoma Court, upon 52 O. S. 1941, 239. The order as written is directed against production and not to common carriers, common purchasers, or public utilities. Appellant here points out that if it is the contention of Commission that the order is based upon the public utility statutes of Oklahoma, it was the duty of Commission to investigate and ascertain what would have been a fair and reasonable price for the producer to receive and this would require Commission to ascertain the investment cost to producer in acquiring its leases and drilling and equipping its wells to produce. This the Commission did not do. Its chairman said they were not conducting a rate hearing (R. 328). The Commission denied the demand and request of Appellant that it compel Peerless to produce the data and information from its records disclosing the investment cost of Peerless in the wells from which it had tendered gas to Cities Service for purchase (R. 338). The public utility statutes of Oklahoma are directed solely against the seller, not the purchaser. *Oklahoma Natural Gas Co.* v. *Corp. Comm. et al.*, 90 Okla. 84, 216 Pac. 917; *Oklahoma Power Co.* v. *Corp. Comm. et al.*, 96 Okla. 53, 220 Pac. 370; *Carey, Recr.* v. *Corp. Comm.*, 168 Okla. 487, 33 Pac. (2d) 788. In *Chicago, R. I. & P. Ry. Co.* v. *State*, 158 Okla. 57, 12 Pac.

(2d) 494, it was held with respect to the public utility statutes:

> "The jurisdiction of the Corporation Commission is limited to those controversies wherein the rights of a public utility and the patrons thereof are involved."

Compare *Central States Power & Light Corp.* v. *Thompson et al.*, 177 Okla. 310, 58 Pac. (2d) 868, 870.

Should it be the contention of Commission that its order is based upon the common purchaser statute 52 O. S. 1941, 240, and that under that statute it had a right to promulgate regulations for the "delivery, metering and equitable purchasing and taking of all such gas," then all that is necessary to refute this contention is to examine the plain language of the order itself, which omits all reference to common purchasers.

The record discloses that Commission's order and application of Peerless and Land Office confined the hearing in this case to the Guymon-Hugoton Gas Field (R. 38-40, 74-176, 31-35, 171-174). No evidence was offered or permitted relating to any other gas field in the State, although the record does show numerous other gas fields in Oklahoma, Exhibit 68 (R. 636A) and that Appellant is a producer and purchaser of gas therein. Commission, as well as the Oklahoma Court, apparently labors under the impression that the statute in question, 52 O. S. 1941, 239, authorizes Commission to limit its order to one common source of supply. We do not so construe the statute. If it is determined that the statute does authorize limiting the gas price-fixing order of Commission to one common source of

supply, then Appellant contends such statute, as well as the price-fixing order of Commission, as applied to Appellant, denies it the equal protection of the laws in violation of the 14th Amendment. There is no just reason, either of logic or law, which authorizes or requires Commission, if it possesses gas price-fixing power, to limit or confine its order to one gas field to the exclusion of other gas fields within the State. There is absolutely no evidence in the record to show that there are some peculiar conditions or circumstances existing in the Hugoton Gas Field with respect to price of gas that do not exist in other gas fields in the State. Nothing appears in the record to show that the waste of gas, the public interest, or the correlative rights of producers are limited and confined wholly to the Guymon-Hugoton Gas Field. What reason could be advanced to justify measuring gas in one field on a different basis than that used in another field? With this sort of logic the basis of measurement of gas or any commodity could be made different in each county. This Court long ago condemned such action as in violation of the equal protection clause. In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925, in speaking of equal protection of the laws, it is said:

> "That no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition * * *."

Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can

never be made arbitrarily and without any such basis." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 155, 41 L. Ed. 668. In *Southern R. Co.* v. *Greene*, 216 U. S. 400, 417, 54 L Ed. 536, 541, it is again said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification" (Citing cases).

Compare *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, and *Met. Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 79 L. Ed. 1070.

It is clear, from the foregoing, that the power of the Legislature to restrict the application of statutes to localities less in extent than the state, as the exigencies of the several parts of the state may require, cannot be used to deprive the citizens of one part of the state of the rights and privileges which they enjoy in common with the citizens of all other parts of the state, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, even though slight, for such classification; *Maryland Coal & Realty Co.* v. *Bureau of Mines of State*, 69 Atl. (2d) 471, 477.

It is recognized that this Court has said the question of equal protection is to be answered by practical considerations based on experience; such as, whether a classifica-

tion has relation to the purpose for which it is made rather than by theoretical inconsistencies; *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110, 93 L. Ed. 533, 539. Courts may not declare a legislative discrimination invalid unless viewed in the light of facts made known or generally assumed, which are of such character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators; *Met. Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, 79 L. Ed. 1070, 1073. The ultimate test is not whether one gas field differs from another gas field but whether the differences between them are pertinent to the subject with respect to which the classification is made; that is, price and measurement base; *Met. Casualty Ins. Co.* v. *Brownell, supra.* The selective application of a regulation to a particular class denies the equal protection of the laws if it rests on grounds wholly irrelevant to achievement of the regulation's objective; *Kotch* v. *River Port Pilot Commrs.*, 330 U. S. 552, 556, 91 L. Ed. 1093, 1097. In the absence of any showing of reasonable basis for the classification made by statute, the Court has no right to conjure up possible situations which might justify the discrimination; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 274, 80 L. Ed. 675, 679.

It is not difficult to understand that where Commission is promulgating well-spacing regulations, or regulations to prevent the waste of gas as a commodity, it would be proper and reasonable to limit the regulation to a single source of supply. This would be true because of the various and divergent conditions and circumstances existing in the subsurface structures and formations in the various oil and gas fields.

It cannot, however, be true with respect either to measuring the gas or fixing the price thereof. In the light of the relevant facts, what reason may be advanced and what rational basis exists for the territorial classification of measurement and price fixing in the instant case? It is not the fact that the order is merely limited to a certain locality; rather, it is the limiting of the order to a particular territorial area for the purpose of fixing a price and measurement base when there exists no conditions or circumstances in the territory selected as distinguished from the territories not affected by the order sufficient to afford any basis for such classification. Equal protection of the laws required by the 14th Amendment is not achieved through indiscriminate imposition of inequalities, and the power of the states to create and enforce property interests must be exercised within the boundaries defined by the 14th Amendment; *Shelley* v. *Kraemer*, 334 U. S. 1, 22, 92 L. Ed. 1161, 1185. It is submitted that there are no practical differences in conditions and circumstances in the Guymon-Hugoton Gas Field, appearing in this record, that would make price fixing or change of the measurement base necessary in that field to the exclusion of other gas fields in the state (R. 291). Commission has limited its hearing and investigation to the Guymon-Hugoton Gas Field (R. 38-40, 174-176, 31-35, 171-174). The discrimination of its gas price-fixing and measurement order is of such character, viewed in the light of facts shown by the record, or that can by common experience be generally assumed, that the classification made by it does not rest upon any rational basis, and by reason thereof the statute and the order as applied to Appellant violate the equal protection clause of the 14th

Amendment. The latter statement is re-emphasized by the very language of the statute, 52 O. S. 1941, 239, upon which the Court bases its decision that Commission is possessed of gas price-fixing powers by implication. The Legislature, in the last line of the statute, expressly directs Commission, in promulgating its regulations, "to prevent unreasonable discrimination in favor of any one common source of supply as against another." Where the price of gas in one field is increased and in the other gas fields of the state is left unregulated, the result is conducive to discrimination. It would be possible, as condemned by the Oklahoma Court in this case, to take more gas in one place on a low cost than in another place on a higher cost (R. 909-910). It is therefore apparent that the price-fixing order of Commission in question promotes rather than prevents discrimination.

III.

Is Order 19514 of the Oklahoma Corporation Commission, as written, carrying severe penalties for violation thereof, so vague, indefinite and uncertain, the findings of fact and law so intermingled, and the Order subject to so many varying and contradictory interpretations that a producer or purchaser from a producer cannot in advance of production or purchase, with clarity and particularity, determine his rights, duties and obligations thereunder as due process requires?

Order 19514, as decided by the Supreme Court of Oklahoma, is based upon 52 O. S. 1941, 239, a section of the 1915 Gas Conservation Act (R. 895, 910). 52 O. S. 1941, 241,

another section of the same Gas Conservation Act, provides that Commission, in the exercise and enforcement of its jurisdiction, is authorized, for violation of its orders, to punish as for contempt as in proceedings under its control over public service corporations as now provided by law. Art. 9, Sec. 19, of the Oklahoma Constitution, relating to public service corporations, makes Commission a court and provides that for failing or refusing to obey any order of the Commission the offender may be fined by the Commission such sum, not exceeding $500.00, as the Commission may deem proper, or such sum in excess of $500.00, as may be prescribed or authorized by law; that each day's continuance of such failure or refusal shall be a separate offense. 52 O. S. 1941, 247, another section of the same Gas Conservation Act, provides that in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, *directly or indirectly* violating the provisions of this Act (italics supplied) (which includes 52 O. S. 1941, 239) shall be guilty of a misdemeanor and upon conviction thereof, in a court of competent jurisdiction, shall be punished by fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment. The Supreme Court of Oklahoma in its opinion in this case (R. 896, 905), plainly indicates that unless a party taking gas from the field pays the established field price fixed by its order for the gas so taken, that Commission may shut in the taker's wells.

From the foregoing it is very apparent that one who fails or refuses to obey and comply with Commission's gas

price-fixing Order 19514 is subject to severe penalties. Appellant, in its Sixth Assignment of Error to the Oklahoma Supreme Court (R. 900) contended that this order of the Commission was void because of vagueness, indefiniteness and uncertainty. Heretofore, in this brief, Appellant pointed out the decision of this Court holding that statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligations, rather than that such measure should be dependent upon the discretion of administrative officers, to the end that ours may continue to be a government of written laws rather than one of official grace; *United States* v. *Northern Pac. Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243. In its opinion the Supreme Court of Oklahoma recognized that the order here under consideration is legislative in character and stated it is "subject in a large measure to the rules and principles by which the validity of statutes are determined" (R. 916). This is in line with the Court's previous pronouncements. In *Associated Industries* v. *Industrial Welfare Comm.*, 185 Okla. 177, 90 Pac. (2d) 899, 914, the Oklahoma Court had occasion to consider an indefinite, uncertain and vague order. In the 13th syllabus, the Court said:

> "An administrative order legislative in character or a portion thereof, is void for uncertainty if it is so vague and indefinite that the courts are unable to determine with any degree of certainty what was intended thereby."

An examination of the Oklahoma Court's opinion in this case discloses that although Appellant contended the order was void for vagueness, indefiniteness and uncertainty,

that Court neglected to clarify the meaning of the order (R. 895-917). Appellant, in its Petition for Rehearing in the State Court, again pointed out to the Court the vagueness, indefiniteness and uncertainty of this order (R. 931-932). It called the attention of the Court to the fact that said Order 19514 was subject to many varying and contradictory interpretations, and in the following language pointed out:

> "That Order No. 19514 under the opinion and decision of this Court as rendered herein is subject to the interpretation that no natural gas shall be produced in the Guymon-Hugoton Gas Field by a producer unless such producer receives for the gas he may sell within the State of Oklahoma, whether the sale of such gas be made for delivery at the wellhead, at the pipe line of purchaser or elsewhere within the state, a price at the wellhead of not less than 7 cents per mcf measured at a pressure of 14.65 lb. absolute pressure per square inch, and that producers who were and are producing and gathering gas in said field and delivering same after production and gathering for sale under subsisting gas purchase contracts, at the pipe line of Cities or other purchasers of gas in the field, must either be paid for such gas a price at the wellhead of not less than 7 cents per mcf and upon the pressure base fixed by Commission's order or Commission can shut in said producers' wells and thereby interrupt and stop the flow of gas under said subsisting gas purchase contracts.
>
> "That said opinion and decision of this court is subject to the further interpretation that said order means that if a producer of gas in said field does not elect to sell his produced gas in Oklahoma he may, if he pays the production tax and his royalty owners on the basis fixed by the Commission's order, transport such gas so produced outside the state and there sell or dispose of

it at such price as such producer may determine, without further obligation under Commission's said order.

"On the other hand, said opinion and decision is subject to the interpretation that said order means that even if a producer does not sell his gas in Oklahoma but transports such gas so produced outside the state and there under subsisting contracts or new contracts sells or disposes of it, such producer must realize and receive from such sale or disposal at the wellhead of the produced gas a price of not less than 7 cents per MCF measured upon the pressure base fixed by Commission's said order.

"Said opinion and decision is also subject to the interpretation that Order No. 19514 is only applicable to sales of gas made by a producer to a purchaser at the wellhead in said field and that it does not apply to the sales of gas where producer produces and gathers the gas and, after such production and gathering, sells and delivers such gas to the purchaser at the pipe line of purchaser in said field or elsewhere within the State of Oklahoma outside said field" (R. 931-932).

The Oklahoma Supreme Court again declined to clarify the meaning of said order and the petition for rehearing was denied without opinion (R. 944). It is recognized that if the Oklahoma Supreme Court had in its opinion construed this order so as to remove the vagueness, indefiniteness and uncertainty thereof, this Court might say Appellant's contentions in this respect are not now available to it; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137, 139, 68 L. Ed. 593, 596. Such is not the case here. The Oklahoma Court, although having had ample opportunity to remove the uncertainty, failed to do so, and we submit, using the language of this Court:

> "A statute (or order) which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" (Insert supplied). *Connally* v. *General Construction Co.*, 269 U. S. 385, 393, 70 L. Ed. 322, 329.

In *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083, this Court said:

> "In the light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. *It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all*" (Italics supplied) (Citing cases).

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463, 71 L. Ed. 1145, 1155, this Court pointed out that the principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation (Citing cases). While it is recognized that this Court has recently determined that the standards for certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement, *Winters* v. *New York*, 333 U. S. 507, 515, 92 L. Ed. 340, 849, it should not be here overlooked that the penalties that may be inflicted upon Appellant for a violation of the order are severe and heavy. It is entirely possible that the heavy fine or jail sentence, or both, provided by 52 O. S. 1941, 247, could be applied to Appellant. The statute says

"directly or indirectly" and, therefore, a violation of the order may be an indirect violation of the statute.

Must Appellant be required to guess at the meaning of the Commission's order, and the extent to which it may be applied, under dire penalties for failure to correctly comprehend the meaning, extent and operation of the order? What does the Commission mean by the word "take"? Does it mean produce, purchase, or does it include both activities? Must Appellant, in order to obtain gas by purchase, pay its vendors 7¢ per mcf on the prescribed pressure base plus a gathering charge, instead of the contract price of 4½¢ per mcf for gathered gas on a different pressure base or is it required only to pay its vendors for royalty gas on the basis of the order? With respect to Appellant's produced gas that it utilizes in the drilling of wells and as fuel for its field compressors or that it utilizes for other lawful purposes, if the order applies to such gas how will the Appellant comply with the order? Must Appellant sell all of its gas instead of utilizing a portion of it?

In the *Phillips Petroleum Company* case, Order No. 19702 (R. 853-857), the Commission recognized the indefiniteness and uncertainty of its order and as an afterthought it endeavored to attach a meaning thereto that was not reflected in its original findings. (Finding 4) (R. 854-855). The decision of the Oklahoma Supreme Court still leaves the meaning, extent and operation of the order completely in doubt.

Appellant produces gas from 123 wells in the Guymon-Hugoton Field (R. 397). It purchases gas under contract from producers owning many more wells in the field. All

of this gas is commingled, transported through and out of the State of Oklahoma and sold.

As to its produced gas, if Appellant is the *taker* under the order, it does not know how to *take* at a price at the well-head of 7¢ per mcf. As to the gas Appellant purchases for 4½¢ per mcf at its pipe line in the field, Appellant does *take* the gas after it has been produced by others and transported to its pipe lines, but Appellant does not know whether it *takes* gas from the producing structures as contemplated by the order.

If, as indicated by the Phillips order, *supra*, and at least suggested by the decision of the Oklahoma Supreme Court, Order No. 19514 is applicable both to purchasers and producers, then Appellant is supplied with no standard to determine how it could be sure it paid a price sufficient to render 7¢ to its vendors when the gas is related to the well-head. Fair compensation to Appellant's vendors for gathering the gas could involve a varying charge depending upon the current investment in facilities, the proper period of amortization and other factors. Also there would be involved the question of fair return, the use of original cost or reproduction cost, the determination of proper depreciation and other factors concerning which the order is completely silent.

Appellant is at a loss to understand how under the order it can protect its markets with adequate reserves and a continuous and uninterrupted supply of gas over a long period of years with any degree of assurance as to the extent of the rights it has acquired under its contracts.

Appellant cannot foresee the obligations of the order with enough certainty to definitely plan the financing of its operations and the expansion of its facilities.

To be sure the order applies to Appellant as a producer, or purchaser, or both, and Appellant has been deprived of substantial property rights with respect to the disposal of its produced gas and in the purchase of gas produced by others. *Buchanan* v. *Warley*, 245 U. S. 60, 62 L. Ed. 149; *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 71 L. Ed. 718. But to determine the exact extent and manner of such deprivation and substantial alteration of its property rights under the order is an utter impossibility.

Appellant submits that to require it in view of its extensive operations and investment and its duty to the public to maintain a constant uninterruptible supply of gas to its markets, to guess at the meaning, extent, effect and coverage of Commission's order denies Appellant due process of law. *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Connally* v. *General Construction Co.*, 269 U. S. 385, 393, 70 L. Ed. 322, 329. To require any producer or purchaser to be dependent in the conduct of its business upon the discretion of subordinate administrative officers and boards abolishes the well established rule of this Court that our government shall be one of written laws rather than one of official grace; *United States* v. *Northern Pacific Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243. Appellant feels confident this Court will not require it to conduct its business and operations upon a basis that would require it to be dependent upon an order so vague, indefinite and uncertain. Particularly so when it

is subjected to such severe penalties for guessing wrong as to the meaning, extent and coverage of the order.

IV.

Does 52 O. S. 1941, 233, contain a sufficient standard within the meaning of the provisions of the 14th Amendment to guide the Oklahoma Corporation Commission in fixing a price higher than the market, current or going price and other terms for the taking and purchasing of natural gas different from those prevailing in the field at the time and place of the tender, taking or purchase where the parties thereto cannot agree upon the terms thereof?

If the Oklahoma Corporation Commission is lawfully empowered by 52 O. S. 1941, 233, for the purpose of settling a dispute between a producer and a taker or purchaser of gas, to fix the price or terms thereof, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a purchaser and taker of natural gas in Oklahoma prove facts legally sufficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19515, make the findings it did in support thereof, and apply retroactively to Appellant by said order, in settling said dispute, the price and measurement base fixed by its legislative Order 19514, when such applied price was twofold the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the Guymon-Hugoton Field made as authorized by 52 O. S. 1941, 233?

These two propositions relate to Commission's judicial Order 19515 and the statute (52 O. S. 1941, 233) upon which said order was based and will be discussed together. At

e outset, Appellant desires to point out to this Court that
d Commission, under 52 O. S. 1941, 233, ascertained the
ing, current or market price and other terms for taking
d purchasing natural gas existing in the field, Appellant
ould not be here complaining of Commission's Order
515. In this connection we desire to call again the atten-
on of this Court to the application of Peerless (R. 33)
d the answer of Cities Service (R. 48). An examination
these pleadings will show the indisputable fact ad-
itted by Peerless that Cities Service was during all times
aterial herein agreeable to taking, by purchase, the gas
om the Peerless wells at the going, current or market
ice then existing in the field in conformity with subsist-
g Order 17867 (R. 33, 48, 543) of the Commission and
isting laws of Oklahoma. The first question then pre-
nted is whether 52 O. S. 1941, 233, contains a sufficient
andard within the meaning of the provisions of the 14th
mendment to guide said Commission when acting under
id statute to fix a price higher than the going or market
ice and other terms for the taking and purchasing of
tural gas different from those prevailing in the field at
e time and place Peerless tendered its gas to Cities Serv-
e for purchase. The language of the statute reads, "* * *
case they cannot agree at such a price and upon such
rms as may be fixed by the Corporation Commission after
tice and hearing." In the very recent case of *Saia* v.
ew York, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577, this
ourt, in considering a city ordinance having the force
a statute which forbade the use of sound amplification
vices except with the permission of the Chief of Police,
id, "there are no standards prescribed for the exercise

of his discretion." This Court struck down the ordinance as unconstitutional. We submit that the statute here under examination grants Commission, where the parties to the taking or purchasing of gas cannot agree, the right to fix such a price and such terms for the taking and purchasing as the Commission in the exercise of its uncontrolled discretion may deem proper. The case at bar falls clearly within the ruling of this Court in *Saia* v. *New York, supra*. To constitute a proper standard within the meaning of the due process clause, the power to be exercised must be canalized so that the exercise of the delegated power will be restrained by banks in a definitely defined or at least a reasonably ascertainable channel. As pointed out heretofore in this brief, the test is whether the statute is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463, 71 L. Ed. 1146, 1155; *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 239, 69 L. Ed. 589, 593. Is it possible for Appellant or any reasonably intelligent and prudent person to read this statute and be able therefrom to ascertain the extent of Commission's authority? As shown by the reasoning of this Court in *Fahey* v. *Mallonee*, 332 U. S. 245, 251, 91 L. Ed. 2030, 2037, the purpose of the plain language of the statute is clearly disclosed to authorize any price or terms of purchase and taking Commission would propose or prescribe as wise and beneficent in settling the claimed dispute. Apparent it is that the statute contains no intelligible or adequate standard to guide Commission in the exercise of any price-fixing authority. *Panama Rfg.*

Co. v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States*, 294 U. S. 495, 79 L. Ed. 1570. It is therefore void because it confers upon Commission arbitrary, capricious and unreasonable gas price-fixing powers in violation of the due process clause of the 14th Amendment; *Nebbia* v. *New York*, 291 U. S. 502, 525, 539, 78 L. Ed. 940, 947.

Should this Court, upon some principle of logic or law with which this Appellant is not familiar, find the statute in question does contain an adequate standard, then Appellant contends that the undisputed and indisputable evidence in the record, as applied to Appellant as a purchaser and taker of natural gas in the field, is not legally sufficient under the 14th Amendment to justify Commission's Order 19515. In this connection we reiterate it is indisputable that at the time Peerless tendered gas from its wells to Cities Service for purchase there existed in said field subsisting basic Order 17867 of Commission (R. 535-549). This order as construed by the Supreme Court of Oklahoma, *Application of Moran*, 201 Okla. 43, 200 Pac. (2d) 758, required Peerless, in order to have its acreage considered or held to be producing acreage, to tender, in good faith, the gas from its wells to Cities Service at the going price in the field (R. 543). It cannot be denied that at said time there was in full force and effect Revised Maximum Price Regulation 436 (R. 748-790) promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended, 50 U. S. C. A. 901, *et seq.*, making it unlawful for Peerless to tender its gas to Cities Service for purchase at a price in excess of 4¢ per mcf (R. 745-747). If Cities Service had accepted said gas so tendered to it

by Peerless at the 6¢ price, shown by the Peerless written tenders (R. 35-38), both Peerless and Cities Service would have been subject to federal prosecution for a violation of the Emergency Price Control Act and Revised Maximum Price Regulation 436 (R. 748-790), 50 U. S. C. A. 904.

An examination of the plain language of Order 19515 will show that Commission has copied verbatim the provisions of its legislative field price-fixing Order 19514 into Order 19515.

It cannot be denied, and the Supreme Court of Oklahoma has decided, that Order 19515 is based solely on 52 O. S. 1941, 233 (R. 895). It must be conceded that subsisting regulations of Commission, Order 17867 (R. 535-549), required at the time Peerless tendered its gas to Cities Service that it do so at the going price in the field (R. 543). It cannot be disputed that Order 19515 is judicial in character because the authority for the order as decided by the Oklahoma Supreme Court is based upon past facts and under a statute and regulations in existence at the time of the tender of gas. In *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, this Court pointed out the fundamental distinction between judicial and legislative inquiries when it said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

What the Commission did in this case was well recognized by the Supreme Court of Oklahoma when it said with respect to Order 19515:

> "The portion of the order directing payment for the gas so taken at not less than seven cents per thousand cubic feet at the wellhead rests upon the Commission's general order (19514) prohibiting the taking of gas from the producing structures or formations in the field for a price at the wellhead of less than seven cents per thousand cubic feet" (Insert supplied) (R. 905).

It is thus apparent that what Commission has done is to promulgate its legislative gas price-fixing order and apply it retroactively to Appellant by its judicial order.

That this cannot be done to the detriment of vested property rights and existing defenses accruing before the promulgation of the order is well settled. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 198, 80 L. Ed. 575, 581; *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107; *Fidelity and Deposit Co. of Maryland* v. *Arenz*, 290 U. S. 66, 68, 78 L. Ed. 176, 178.

This is particularly true where the statute does not expressly authorize the making of retroactive orders. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, 163, 72 L. Ed. 509, 511, 512. The principle is strictly applicable to statutes which have the effect of creating an obligation. An administrative regulation is subject to the rule equally with a statute and, accordingly, the legislative field price-fixing order of Commission cannot be applied retroactively. *Miller* v. *United States*, 294 U. S. 435, 439, 79 L. Ed. 977, 981.

To permit Commission to do so would divest Appellant of its defense of unlawful tender acquired under subsisting Order 17867 (R. 535-549). *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107; compare *Coombs* v. *Getz*, 285 U. S. 434, 441, 76 L. Ed. 866, 871. This Court has said:

> "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apts. Co.* v. *Commr. of Internal Revenue*, 323 U. S. 141, 164, 89 L. Ed. 139, 153.

The Legislature of Oklahoma, in the instant case, has not authorized the making of retroactive orders by Commission.

Attention is directed to that part of 52 O. S. 1941, 233, which limits the authority of the Commission to fix price and terms only in case the parties to the taking and purchase cannot agree. The undisputed evidence in this case shows that Cities Service is purchasing gas, pipe line delivered in the field, under three separate subsisting contracts (R. 668-712, 713-744, 795-802) at a price of 4½¢ per mcf delivered to its pipe line system in the field, the ½¢ being for gathering, transporting and delivering (R. 396). Paragraph 9 of Commission's subsisting basic Order 17867 requires that all purchasers, takers and producers of gas in the pool comply with the common purchaser and ratable taking provisions of the Oklahoma Statute by the equitable purchasing, producing and taking of all gas without discrimination in favor of one producer as against another (R. 548). The common purchaser statute, 52 O. S. 1941, 240, absolutely prohibits a purchaser from discriminating in favor of or against those producers from whom it purchases. If the legislative field order of Com-

mission (19514) means that it is only applicable to producers, then Order 19515, which is directed only against Cities Service, discriminates in favor of Peerless because Cities Service, having entered into its subsisting gas purchase agreements with other producers in the field as authorized by 52 O. S. 1941, 233, at a price of 4½¢ per mcf, pipe line delivered, is required to pay Peerless under the order 7¢ per mcf and measure the gas upon a different pressure base which increases the price to practically 8¢ per mcf. Order 19515 is a judicial directive solely against Cities Service for the pecuniary benefit and advantage of Peerless alone and discriminates in its favor and against Appellant and other producers in the field.

While Commission in its findings in support of Order 19515 found that Cities Service is a common carrier, a common purchaser, and a public utility (R. 26), the findings are immaterial because Cities Service has during all times material herein been ready and willing to take by purchase the gas of Peerless (R. 48). In addition, the Oklahoma Supreme Court by its interpretation of the statute, has made such findings irrelevant because of its decision in *Republic Natural Gas Co.* v. *Oklahoma*, 198 Okla. 350, 180 Pac. (2d) 1009, wherein it construes 52 O. S. 1941, 233, to apply to any producer who is taking gas from the field regardless of whether such producer is a common carrier, common purchaser, or a public utility.

The Supreme Court of Oklahoma in its decision in the case at bar has laid much stress upon the dissenting opinion of certain justices of this Court in the case of *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 99, 92 L. Ed. 1212, 1236. Appellant here makes no contentions against

the views expressed in the dissenting opinion. In the *Republic* case, Appellant does want to point out that the issue there related to the taking of the gas as gas and was not concerned with the price or proceeds thereof. Republic refused to take the gas under any circumstances. In the case at bar Cities Service has offered to take the Peerless gas and is taking the Peerless gas under the stipulation (R. 48, 211, 589-590) so there can be no question of drainage. The only issue is price and change of measurement base. In the dissenting opinion of MR. JUSTICE RUTLEDGE, concurred in by three other members of this Honorable Court, in speaking of the terms and provisions of the statute, 52 O. S. 1941, 233, it is said:

> "This assumes that if the parties should be unable to agree upon terms, the Commission will fix them in a manner *taking due account of prevailing market conditions relevant to the price to be paid,* as well as reasonable compensation for the use of Republic's facilities. *With those limitations properly applied,* it is hard to see what great business risk will be shifted to Republic" (Italics supplied).

It is clear that the minority opinion of this Court in the *Republic* case anticipated that Commission in fixing the price would give due consideration to prevailing market conditions relevant to the price Republic would have to pay. In the case now before this Court the record is plain that Commission, instead of ascertaining the going, current or market price existing in the field, totally disregarded it and arbitrarily increased the price twofold and commanded that Cities Service pay to Peerless that amount. The dissenting opinion in the *Republic* case is in line with the

dissenting opinion of MR. JUSTICE HALLEY in the case at bar, as he said (R. 593):

> "The price fixed by the Commission where seller and buyer are unable to agree upon a price, should be the current market price prevailing in the field. Any other price would be unfair, discriminatory and inequitable."

The foregoing discloses the arbitrary and unreasonable action taken in this case and is further proof of the fact that the order here under consideration, as well as the statute upon which it is based as applied to Appellant, is a nullity and should be set aside and declared invalid.

V.

Was Appellant granted procedural due process in accordance with the provisions of the 14th Amendment at the hearing before the Oklahoma Corporation Commission leading to the issuance of Order 19515?

Before undertaking a discussion of this proposition it is essential at the outset to acquire a clear picture of the character of each of the orders of the Commission under consideration in this appeal. For many years this Court's decision in the case of *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, clearly pointing out the distinction between a judicial and legislative inquiry, has been recognized and followed by the various state courts. Oklahoma has been no exception. *Associated Industries* v. *Industrial Welfare Comm.*, 185 Okla. 177, 90 Pac. (2d) 899. This Court, in *Prentis* v. *Atlantic Coastline Co.*, *supra*, page 226, declares:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

It cannot be gainsaid that Order 19514 looks to the future and changes existing conditions in the Guymon-Hugoton Gas Field with respect to price and measurement base by making a new rule with respect thereto to be applied thereafter to all producers and perhaps purchasers of gas in the Guymon-Hugoton Field. Neither can it logically be denied that Order 19515 is directed solely against Appellant because it clearly declares and enforces a liability against Appellant in favor of Peerless on past facts and under a specific statute, 52 O. S. 1941, 233, and a particular regulation, Order 17867 (R. 535-549), both in existence at the time of the accrual of the facts and the issuance of the questioned order. The Oklahoma Court, in the case of *H. F. Wilcox Oil & Gas Co.* v. *State*, 152 Okla. 89, 19 Pac. (2d) 347, had occasion to and did clearly disclose the distinction between legislative and judicial orders as applied to Commission and its powers when promulgating and enforcing its regulations for the prevention of waste. On page 350 of the Pacific citation, that Court said:

> "*In making such rules it acts in a legislative capacity.* When making such rules it may ascertain in any manner it sees fit what rules should be made and it may make such rules without the hearing of any evidence or without regard to the evidence heard. *When it attempts to apply those rules in order to pre-*

vent waste or to regulate production, it acts in a capacity at least quasi judicial. When so acting it must act either under the rules of procedure and evidence provided by the legislature, or under rules of procedure and evidence provided by itself, and it may not then act without evidence or upon incompetent, irrelevant and immaterial evidence" (Italics supplied).

Compare *Skelly Oil Co.* v. *Corp. Comm.*, 183 Okla. 364, 82 Pac. (2d) 1009, 1010. In Oklahoma the Corporation Commission has been granted powers withheld from ordinary administrative agencies which enable it to so function as a legislative as well as a judicial and executive body. *Patterson* v. *Stanolind Oil and Gas Co.*, 182 Okla. 155, 77 Pac. (2d) 83, 92. The Corporation Commission of Oklahoma, in the exercise of its function as a legislative, judicial and executive body, has promulgated general rules and regulations, among other things governing the various procedures before it, Exhibit 70 (R. 672-685). Article II of the Procedural Rules (R. 675) covers the procedure of the Commission in promulgating rules and regulations governing the conservation of oil and gas. Article IV of said Procedural Rules (R. 680) prescribes the rules of practice and procedure to be followed in making orders, enforcing laws relating to equitable and ratable taking of oil and gas, and promulgation of orders of Commission with respect thereto. Section 3 of Article IX of said Rules (R. 687) provides:

"In proceedings and hearings before the Commission relating to the conservation of oil and gas and the equitable and ratable taking thereof, *the Commission shall be governed by the code of civil procedure of the State of Oklahoma in all matters not covered by law*

relating to the conservation of oil and gas or by the rules of practice and procedure herein prescribed" (Italics supplied).

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433, this Court had occasion long ago in speaking of procedural due process before an administrative tribunal exercising *quasi* judicial powers to say:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi judicial* in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence" (Citing cases).

This ruling of the Court has been reiterated; *Southern Railway Co.* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 195, 78 L. Ed. 260, 264. In *Kessler* v. *Strecker*, 307 U. S. 22, 34, 83 L. Ed. 1080, 1090, this Court said:

> "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the department must stand and cannot be corrected in judicial proceedings. *If, on the other hand, one of the elements mentioned was lacking, the proceeding is void and must be set aside"* (Italics supplied).

Compare *Bridges* v. *Nixon*, 326 U. S. 135, 154, 89 L. Ed. 2103, 2115. The Oklahoma Supreme Court has consistently recognized these principles of procedural due process except in the instant case. In *Skinner* v. *State*, 189 Okla. 235, 115 Pac. (2d) 123, it said, on page 126 of the Pacific citation:

> "Due process has a dual significance as it pertains to procedural and substantive law. As to procedure it means notice and an opportunity to be heard and to defend *in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause*" (Italics supplied). See *Skinner* v. *State*, 316 U. S. 535, 86 L. Ed. 1655.

Compare *H. F. Wilcox Oil & Gas Co.* v. *Walker*, 169 Okla. 33, 32 Pac. (2d) 1044, 1049; *Hauschuldt* v. *Collins*, 152 Okla. 193, 4 Pac. (2d) 99.

When this Court examines the record before it Appellant believes its inescapable conclusion will be that Appellant has not been granted either a fair and impartial hearing or an orderly hearing adapted to the nature of the case before an impartial tribunal having jurisdiction of the cause. Commission refused to inform Appellant in advance of the hearing, in view of the recitations and facts set forth in its motion (R. 44-45), what rules of practice and procedure would be applied (R. 64). Commission allowed the misjoinder of judicial and legislative matters and consolidated same for hearing at the same time (R. 179, 180, 181); allowed Commissioners of the Land Office to intervene in in the proceedings (R. 168-176, 178-181, 574); conducted a plebiscite of land and royalty owners while the case was in hearing (R. 112-117) and filed petitions with Federal Power Commission while the trial was in progress stating Commission was interested in increasing the price of natural gas in the Guymon-Hugoton Field (R. 475-476). Commission's Conservation Attorney, as well as the Attorney for the Commissioners of the Land Office, was permitted

to take an active part in the hearing of a private dispute between Peerless and Cities Service (R. 182, 332-333). Commission admitted incompetent, irrelevant and hearsay evidence and testimony (R. 161, 163-164, 118-119, 282-283), and refused to segregate and separate the testimony so Cities Service could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case (R. 339). It refused to recognize, apply and abide by its own subsisting orders (R. 543, 548). In view of all these things, is this Court able to say that Appellant has been granted procedural due process in accordance with the provisions of the 14th Amendment at the hearing before Commission leading to the issuance of Order 19515? We submit it is academic and settled law:

> "An administrative hearing in the exercise of judicial or *quasi judicial* power must be fair, open, and impartial. The right to such hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. The breadth of administrative discretion places in a strong light the necessity for maintaining in its integrity the essentials of a fair and open hearing. When such a hearing has been denied, the administrative action is void." 42 Am. Jur., Sec. 137, pages 479, 480.

See, also, *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 305, 81 L. Ed. 1093, 1102; *Morgan* v. *United States*, 304 U. S. 1, 15, 82 L. Ed. 1129, and cases there cited.

If ours is to be a government of law and not of men, deference for the basic principles underlying procedural due process necessitates that this Court, upon the record of this case, set aside as unconstitutional and unlawful the judicial directive of Commission in this bifurcated and unprecedented proceeding.

VI.

Do Orders 19514 and 19515 and the respective statutes, 52 O. S. 1941, 239, and 52 O. S. 1941, 233, upon which said orders were based, as interpreted and applied to operations of Appellant under the undisputed and indisputable evidence in the record, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant?

If considered separately it seems clear that Orders 19514 and 19515 affect interstate commerce in the same manner. So considered, the difference in their effect is only a matter of degree. However, since Order 19514 is all inclusive with respect to natural gas taken from the producing structures of the Guymon-Hugoton Field and, further, since Order 19515 obviously could not stand if Order 19514 is invalid, no good purpose would be served in considering the two orders separately under this section of the brief. Therefore, Appellant's argument here will be directed against the field-wide order, No. 19514.

The undisputed evidence in the record shows that approximately 90% of all gas produced and transported out of the Guymon-Hugoton Field by the various companies operating therein goes into interstate commerce

(R. 386-387). Virtually all of the gas Appellant produces and purchases goes into interstate commerce (R. 389-390). No processing or packing is involved nor is there any hesitation in the movement of gas from the time it leaves the producing structures and formations. It flows continuously and without interruption to the markets in the several states (R. 401, 462). It is thus clear that the burden cast upon interstate commerce is immediate and substantial. It could not under the circumstances be considered incidental.

The record in this case forcibly illustrates that no waste of gas as defined or contemplated by the Oklahoma Statutes was being committed nor was it threatened or imminent in the Guymon-Hugoton Field (R. 63-321). Correlative rights of producers, landowners and royalty owners in or to gas as such were and are being protected. Conservation of natural gas was and is being had in said field in accordance with existing Oklahoma Statutes and subsisting orders of said Commission (R. 63-321). It is thus clear, in the light of the undisputed evidence in the record, that the practical effect of the order is to prohibit gas from being the subject of interstate commerce unless local economic interests are aided by doubling the going or market price. It is precisely this practice which this Court has forbidden in *Hood* v. *Du Mond*, 336 U. S. 525, 530, 531, 93 L. Ed. 865, 870. There the Court said:

> "It is only additional restrictions imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests that are in question here * * *."

This Court flatly stated that such action by a state would neutralize the economic consequences of free trade among the states and set a barrier to traffic between the states as effectively as if customs duties equal to the price differential had been laid upon the thing transported. Repeated emphasis is laid upon the principle that a state may not promote its own economic advantages by curtailment or burdening of interstate commerce.

The only distinction, if any, between the case at bar and *Hood* v. *Du Mond, supra,* is that the "avowed" purpose of the price-fixing order of the Oklahoma Corporation Commission is the prevention of waste. Its "practical effect" is the curtailing of the volume of interstate commerce to aid local economic interests. Appellant has heretofore shown that no waste as contemplated by the Oklahoma Statutes was being committed or was threatened or imminent. It therefore follows that the ostensible purpose of the Corporation Commission of Oklahoma is a guise with which said Commission seeks to do that which is forbidden under the Constitution. Otherwise stated, the Commission, by said order, attempts to bestow upon itself unilaterally the mask of valid exercise of the police power, namely, the conservation of a natural resource. In truth and in fact, however, the sole and only purpose of the order, as revealed by the undisputed evidence, was to gain economic benefits for a small group of producers and royalty owners in the form of increased price simply because the Corporation Commission thought the price of gas was "too low."

This Court has never hesitated to inquire into such action by the state which attempts by construction to circumvent the provisions of the Federal Constitution. In *Minnesota* v. *Barber*, 136 U. S. 455, 34 L. Ed. 313, the State of Minnesota had enacted, purportedly as a health measure, an inspection provision requiring that all meat sold in that state must be inspected and approved by state authorities within twenty-four hours after slaughtering. This Court held that although such statutory requirement purported to be a valid exercise of the police power of the state in protecting the health of its citizens, it was, nevertheless, only a guise for the prevention of importation of beef from Illinois. If this Court were not free to examine into the true purpose of state action the states could in almost any instance they chose circumvent the provisions of the Federal Constitution merely by a self-serving declaration of a valid exercise of state power.

In the case of *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255, 55 L. Ed. 716, 726, this Court said:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which

would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

In the case at bar the nature and effect of the interference with interstate commerce by the State of Oklahoma is similar to that which would have resulted from the conservation measure attempted by Oklahoma in the case of *West* v. *Kansas Natural Gas Company, supra.* There the avowed conservation measure would have prohibited natural gas from being the subject of interstate commerce, for the purpose of bestowing benefits upon the inhabitants of the state. Here, under the guise of the

prevention of waste of natural gas, the State of Oklahoma seeks, not necessarily to bar, but to heavily burden interstate commerce, for the purpose of bestowing pecuniary benefits upon a very small and selected segment of its population.

The Oklahoma Supreme Court in its opinion labors under the impression that because it has said the minimum gas price field order regulation is imposed before any operations of interstate commerce occurred that the order does not concern interstate commerce. It cites and relies upon *Parker* v. *Brown*, 317 U. S. 341, 87 L. Ed. 315. Under *West* v. *Kansas Natural Gas Co.* and *Hood* v. *Du Mond*, *supra*, this would make no difference even if true. The Oklahoma Court then quotes the following from the Parker case:

> "No case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer *after processing and packing* them, will in the normal course of business, sell and ship them in interstate commerce." (Italics supplied).

The Court in the *Parker* case made it clear that processing and packing was the answer to the contention that interstate commerce had been unduly burdened. This is not true in the case at bar. As stated in *United Fuel Gas Co.* v. *Hallahan*, 257 U. S. 277, 281, 66 L. Ed. 234, 239:

> "There is no break, no period of deliberation, but a steady flow, ending as contemplated from the beginning, beyond the state line."

Whatever other meaning the Corporation Commission order may have, it is clear that the Commission has said:

> "No natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price at the wellhead of less than 7 cents per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch."

Thus, it is obvious that the Corporation Commission has, in effect, stated that interstate commerce may not be accomplished except on a condition imposed by the State of Oklahoma, to-wit, the payment of the stated price. There is no difference in principle between the case at bar and the situation considered in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596, 597, 67 L. Ed. 1117, 1132. In that case West Virginia attempted, by state legislation, to forbid the export of natural gas from West Virginia until local needs had been satisfied. This Court, in striking down the statute, said:

> "Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce—a prohibited interference. (Citing many cases). The West Virginia Act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now

> going to consumers in the complainant states and therefore will work a serious interference with that commerce."

If Oklahoma can increase the price of gas going into interstate commerce, in order to give an economic advantage and benefit to certain of its royalty owners and selected producers, obviously other states may do likewise with respect to their own products and commodities. The chaotic result is apparent—the harm to the nation immediate and clear. See *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 13, 73 L. Ed. 147, 154. The net result of this course of action is that other states would seek methods of retaliation and the final effect would be the "Balkanization" of commerce among the states. It was to prevent this very result that the interstate commerce clause was included in the Federal Constitution.

A somewhat comparable situation to that in the present case was considered by this Court in *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, 83 L. Ed. 752. In that case the State of Pennsylvania had enacted a law including provisions to protect producers, much like the questioned order of the Commission here involved, particularly with respect to price. One significant distinction, however, was that the statute was passed by the Legislature in the exercise of its police powers and was not, as here, a result of judicial legislation. In the *Eisenberg* case a concern which operated a receiving plant in Pennsylvania from which it shipped milk to the New York City market challenged the act on the grounds, among others, that if construed to require it to pay producers

the price prescribed by the state board, it unconstitutionally regulated and burdened interstate commerce. This Court held, in substance, that since only a small fraction of the milk produced in Pennsylvania was shipped out of the state and since there remained a large field remotely affected and wholly unrelated to interstate commerce, within which the statute did operate, the effect of the statute on interstate commerce was incidental. This Court clearly indicated, however, that the result would have been different in the *Eisenberg* case had the facts indicated a substantial burden on interstate commerce. Here that substantial burden is shown without contradiction to exist. As heretofore stated, approximately 90% of the gas produced in the Guymon-Hugoton Field, Texas County, Oklahoma, is transported out of the state for sale in other states and all of the gas produced and purchased by this Appellant, except an inconsequential amount, is so transported and sold. Compare *Baldwin* v. *Seelig, Inc.*, 294 U. S. 511, 79 L. Ed. 1032, which is the converse of this case.

Certainly Order 19514, whether it directs Appellant as a purchaser of gas to pay 7¢ per mcf on the designated pressure base or simply forbids producers of natural gas from selling their gas to Appellant at a price and on a measurement base different from that prescribed in the order, the result as it affects Appellant with respect to its purchasing of gas is the same. It increases twofold the price of such gas purchased for transportation and sale in other states and casts a substantial and undue burden on interstate commerce. The record shows without contradiction that under each of Appellant's gas purchase

contracts the gas purchased is for transportation to other states (R. 46, 47, 695, 714, 795). The gas is destined for out-of-state use even before it is delivered to Appellant under said contracts.

An identical situation was considered by this Court in *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198, 199, 69 L. Ed. 909, 914. In that case wheat was purchased within the state for out-of-state consumption, approximately ninety per cent thereof being sold within the state to buyers who purchased for shipment and shipped to terminal markets outside the state. This Court held:

> "Buying for shipment and shipping to markets in other states when conducted as before shown constitutes interstate commerce, the buying being as much a part of it as the shipping."

Gas being a commodity which Oklahoma has by its laws and regulations authorized to be produced and reduced to possession, and therefore to become property (R. 507-549), is a legitimate article of commerce; *Pennsylvania* v. *West Virginia, supra.* It is the subject of dealings that are nationwide. The right to buy it for transportation and to transport it in interstate commerce is not a privilege derived from state laws which the state may fetter with conditions. It is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 260, 55 L. Ed. 716, 728; *Best & Company, Inc.* v. *Maxwell*, 311 U. S. 454, 457, 85 L. Ed. 275, 278; *Freeman* v. *Hewitt*, 329 U. S. 249, 252, 91 L. Ed. 265, 271.

Speaking further in the *Shafer* case, this Court said, with respect to the State Act there under consideration:

> "By it that state (North Dakota) attempts to exercise a large measure of control over all wheat buying within her limits. About 90% of the buying is in interstate commerce. * * * Obviously, therefore, the control of this buying is of concern to the people of other states as well as those of North Dakota. Only by disregarding the nature of this business and neglecting important features of the act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. * * * We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause." U. S. 199, 200.

This Court struck the act down on the ground it cast an undue burden on interstate commerce. We submit the principle there applied is applicable to the facts here undisputed. Compare *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *Lemke* v. *Homer Farmers' Elevator Co.*, 258 U. S. 65, 66 L. Ed. 467; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524; *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 79 L. Ed. 1032; and *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 657, 93 L. Ed. 682.

The order is confined in its operation and effect solely to one gas field. The record in this case, Exhibit 68 (R.

636A), shows numerous other gas fields in Oklahoma. Certainly it will not be disputed that there are intrastate companies purchasing gas in these other fields. The Commission having confined its hearing to one field (R. 39, 174, 176), it is not possible to show that the purchasers in these other fields are intrastate companies. The record does show, as heretofore stated, that in the Guymon-Hugoton Field approximately 90% of the gas goes into interstate commerce. In view of the restrictions placed upon the hearing leading to the promulgation of the field-wide price-fixing order in this case, it seems fair to assert that the purpose or objective of this order was and is to favor intrastate business to the detriment of interstate business; otherwise, the order would have been statewide.

Even assuming *arguendo* that the orders of the Oklahoma Corporation Commission might have some incidental effect on the conservation of natural gas, there is no question but that they cast a real, direct, substantial and undue burden on and discriminate against interstate commerce and that the Supreme Court of Oklahoma erred in upholding the validity of said orders and the statutes under the purported authority of which they were made.

CONCLUSION

For the reasons stated and upon the grounds urged, it is respectfully submitted that the final judgment, decree and decision of the Oklahoma Supreme Court should be

reversed and declared null and void because in violation of the Federal Constitution.

Respectfully submitted,

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Of Counsel

October, 1950.

APPENDIX

APPENDIX

APPENDIX A
(1945)

HOUSE BILL NO. 431—By HUGHES

AN ACT DEFINING WASTE OF NATURAL GAS; PROHIBITING WASTE THEREOF; CONFERRING UPON THE CORPORATION COMMISSION JURISDICTION TO FIX THE INTRINSIC VALUE OF NATURAL GAS; AUTHORIZING THE CORPORATION COMMISSION TO PROHIBIT PURCHASE AND SALE THEREOF BELOW SUCH VALUE; PRESCRIBING PROCEDURE; AND DECLARING EMERGENCY

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. In addition to the meanings of waste of natural gas as defined by the laws of the State of Oklahoma, the sale and purchase of natural gas at a price below its intrinsic value shall constitute economic waste, and same is prohibited.

SECTION 2. Jurisdiction is hereby conferred upon the Corporation Commission of Oklahoma to prohibit the sale and purchase of natural gas at a price below its intrinsic value; and said Commission is hereby authorized and directed to determine and to fix such intrinsic value in all of the wells and pools in the State of Oklahoma, and to prohibit the sale and purchase of natural gas at a price below such intrinsic value.

SECTION 3. In fixing the intrinsic value of natural gas and prohibiting the sale and purchase thereof at a price below said value, the procedural requirements of Chapter 131, Session Laws of 1933, as amended, shall apply in all cases.

SECTION 4. It being immediately necessary for the preservation of public peace, health and safety, an emergency is hereby declared to exist by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

APPENDIX B
(1947)

HOUSE BILL NO. 439—By FIELD, MUSGRAVE of the House, and LEONARD of the Senate

AN ACT TO CONSERVE NATURAL GAS IN THE STATE OF OKLAHOMA, TO PREVENT WASTE THEREOF, PROVIDING FOR THE RATEABLE AND EQUITABLE TAKING THEREOF, GOVERNING THE PRODUCTION, MARKETING, PURCHASE AND SALE THEREOF, SUPPLEMENTING LAWS NOW IN EFFECT RELATIVE THERETO, SUPPLEMENTING THE AUTHORITY OF AND CONFERRING AUTHORITY ON THE CORPORATION COMMISSION; AND DECLARING AN EMERGENCY,

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. The term waste, as used herein, in addition to the ordinary meanings and in addition to the other meanings provided for in the oil and gas statutes of the State of Oklahoma now in effect or enacted by this Legislature, shall include Economic Waste and Wasteful Utilization of natural gas.

SECTION 2. (a) The Legislature of the State of Oklahoma hereby declares that: The present low price of natural gas available to producers of natural gas in this State, the discrimination in the purchase and marketing of natural gas, the stifled markets of natural gas due to monopolistic control of markets of natural gas, the marketing of natural gas in excess of the reasonable and necessary market demands therefor, the inability of producers to expand existing markets or to develop new or larger markets for natural gas produced in this State tend to prevent producers of natural gas and those in the employ of such producers and owners of minerals from contributing their fair share to the support of the necessary govern-

mental and educational functions and thereby tend to increase unfairly the tax burdens on other citizens of the State, result in waste of natural gas, as such waste is defined herein, and in inequitable taking and marketing of natural gas in this State.

(b) The aforesaid conditions vitally concern the health, peace, safety and general welfare of the people of this State and result in the wasteful dissipation and wasteful utilization of natural gas one of the great and irreplaceable resources of the State. It is declared to be the policy of this State to aid producers of natural gas in preventing or correcting adverse marketing conditions, improving existing marketing conditions, expanding existing markets, developing more orderly or efficient or equitable methods of taking, producing and marketing natural gas and thereby enabling the producers of natural gas, those in the employ of such producers and mineral owners to contribute their fair share to the support of necessary governmental and educational functions of the State and preventing the waste of natural gas.

(c) The production, taking, and marketing of natural gas in this State is hereby declared to be affected with a public use and interest. The provisions of this Act are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State and for the purpose of preventing the waste of natural gas, one of the great natural resources of this State.

SECTION 3. For the purpose of carrying out and making effective the purposes of this Act as expressed in the Legislative Declaration hereof, the Corporation Commission of this State is authorized and empowered and is directed to make and enter such orders and to make and prescribe such rules and regulations to regulate the production, taking, marketing, sale and purchase of natural gas and to fix and prescribe such a minimum price of

natural gas at the wellhead, in each common source of supply or field producing natural gas, as to prevent discrimination in the marketing, sale and purchase of natural gas, the marketing of natural gas in excess of market demand, the waste of natural gas and to promote the equitable and rateable taking of natural gas, the expansion of the existing markets for natural gas and the development of new markets for the same, in each source of supply or field producing natural gas. In fixing the price, terms and conditions of the taking and sale and purchase of natural gas the Commission shall not be limited to the utility rule of "reasonable return on investment" but may take into consideration any and all factors, which, in the discretion of the Commission, shall be conducive to the attainment of the purposes of this Act. Provided that the Commission shall take into consideration the price of natural gas at the wellhead in adjoining states producing from a common source of supply in arriving at the price to be set in Oklahoma.

SECTION 4. Any producer or taker of natural gas or any owner of mineral interests in any common source of supply or field producing natural gas in this State, may make application to the Corporation Commission for an order of said Commission or the Commission may, on its own motion and after notice, make and enter an order prescribing rules and regulations governing the production, taking, marketing, sale and purchase, including a minimum price of natural gas at the wellhead and the terms and conditions of the production, taking, marketing and purchase and sale of natural gas in each common source of supply or field producing natural gas in this State.

SECTION 5. Notice of hearing, procedure, and appeals shall be had in conformity with the statutes and rules of the Corporation Commission now or hereafter in effect relating to oil and gas.

SECTION 6. That nothing in this Act shall be construed as repealing the laws of this State now in effect relating to rateable taking of natural gas, proration of natural gas, common purchasers of natural gas, price or terms of taking of natural gas, or well spacing of natural gas wells, but this Act shall be supplementary of such acts now in effect or enacted by this Legislature.

SECTION 7. The Corporation Commission is hereby authorized and empowered to punish, in contempt proceedings, any person, firm or corporation violating any order, rule or regulation entered pursuant hereto.

SECTION 8. The invalidity of any section, subdivision, clause or sentence of this Act shall not in any manner affect the validity of the remaining portion thereof.

SECTION 9. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force and effect from and after its passage and approval.

APPENDIX C
(1949)

SENATE BILL NO. 121—By LEONARD of the Senate and FIELD of the House

AN ACT TO CONSERVE NATURAL GAS IN THE STATE OF OKLAHOMA, TO PREVENT WASTE; PROVIDING FOR THE RATEABLE AND EQUITABLE TAKING THEREOF, GOVERNING THE PRODUCTION, MARKETING, PURCHASE AND SALE THEREOF, SUPPLEMENTING LAWS NOW IN EFFECT RELATIVE THERETO, SUPPLEMENTING THE AUTHORITY OF AND CONFERRING AUTHORITY ON THE CORPORATION COMMISSION; MAKING PROVISIONS OF THIS ACT SEVERABLE; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. The term "waste", as used herein, in addition to the ordinary meanings and in addition to the other meanings provided for in the oil and gas statutes of the State of Oklahoma now in effect or enacted by this Legislature, shall include Economic Waste and Wasteful Utilization of natural gas.

SECTION 2. (a) The Legislature of the State of Oklahoma hereby declares that the present low price of natural gas available to producers of natural gas in this State, the discrimination of the purchase and marketing of natural gas, the stifled markets of natural gas due to monopolistic control of markets of natural gas, the marketing of natural gas in excess of the reasonable and necessary market demands therefor, the inability of producers to expand existing markets or to develop new or larger markets for the natural gas produced in this State tend to prevent producers of natural gas and those in the employ of such producers and owners of minerals from contributing their

fair share to the support of the necessary governmental and educational functions and thereby tend to increase unfairly the tax burdens on the other citizens of the State, result in waste of natural gas, as such waste is defined herein, and in inequita e taking and marketing of natural gas in this State.

(b) The aforesaid conditions vitally concern the health, peace, safety and general welfare of the people of this State and result in the wasteful dissipation and wasteful utilization of natural gas, one of the great and irreplaceable resources of the State. It is declared to be the policy of this State to aid producers of natural gas in preventing or correcting adverse marketing conditions, improving existing marketing conditions, expanding existing markets, developing more orderly or efficient or equitable methods of taking, producing and marketing natural gas and thereby enabling the producers of natural gas, those in the employ of such producers and mineral owners to contribute their fair share to the support of necessary governmental and educational functions of the State and preventing the waste of natural gas.

(c) The provisions of this Act are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State and for the purpose of preventing the waste of natural gas, one of the great natural resources of this State.

SECTION 3. For the purpose of carrying out and making effective the purposes of this Act, as expressed in the Legislative Declaration hereof, the Corporation Commission of this State is authorized and empowered and is directed to make and enter such orders and to make and prescribe such rules and regulations to regulate the production, taking, marketing, sale and purchase of natural gas and to fix and prescribe such a minimum price of natural gas at the wellhead or at the point of delivery by

producer or gatherer, in each common source of supply or field producing natural gas, as to prevent discrimination in the marketing, sale and purchase of natural gas, the marketing of natural gas in excess of market demand, the waste of natural gas and to promote the equitable and rateable taking of natural gas; the expansion of the existing markets for natural gas and the development of new markets for the same, in each source of supply or field producing natural gas. In fixing the price, terms and conditions of the taking and sale and purchase of natural gas, the Commission shall not be limited to the utility rule of "reasonable return on investment" but may take into consideration any and all factors, including economic waste, conservation and rateable purchasing, which, in the discretion of the Commission, shall be conducive to the attainment of the purpose of this Act. Provided, that the Commission may take into consideration the price of natural gas at the wellhead in adjoining states producing from a common source of supply in arriving at the price to be set in Oklahoma.

SECTION 4. Any producer, taker or gatherer of natural gas or any owner of mineral interests in any common source of supply or field producing natural gas in this State, may make application to the Corporation Commission for an order of said Commission, or the Commission may, on its own motion and after notice, make and enter an order prescribing rules and regulations governing the production, taking, marketing, sale and purchase, including a minimum price of natural gas at the wellhead, or producers' or gatherers' delivery point, and the terms and conditions of the production, taking, marketing and purchase and sale of natural gas in each common source of supply or field producing natural gas in this State.

SECTION 5. Notice of hearing, procedure, and appeals shall be had in conformity with the statutes and rules of the Corporation Commission now or hereafter in effect relating to oil and gas.

SECTION 6. That nothing in this Act shall be construed as repealing the laws of this State now in effect, relating to rateable taking of natural gas, proration of natural gas, common purchasers of natural gas, price or terms of taking of natural gas, or well-spacing of natural gas wells, but this Act shall be supplementary to such acts now in effect or enacted by this Legislature.

SECTION 7. The Corporation Commission is hereby authorized and empowered to punish, in contempt proceedings, any person, firm or corporation violating any order, rule or regulation entered pursuant hereto.

SECTION 8. The provisions of this Act shall be severable, and if any section or part of any section of this Act is declared to be unconstitutional, the remainder of the Act shall not thereby be invalidated.

SECTION 9. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

APPENDIX D

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause No. 3982—Order No. 1662

IN THE MATTER OF THE INFORMAL COMPLAINTS OF MILTON THOMPSON AND THE HOME GAS COMPANY VS. THE CREEK COUNTY GAS COMPANY.

OPINION AND ORDER

By the Commission:

The complaints in this case are, in substance, that the fair price at the well in the Cushing Field is 9¢ per M. cu. ft.; that the Creek County Gas Company is purchasing gas at the wells of the complainant and from other wells and has been paying 6¢ per M. cu. ft.; that it recently made a contract with the Oklahoma Natural Gas Company whereby the Creek County Gas Company is receiving 10¢ per M. cu. ft. for gas so purchased.

On June 11th the Creek County Gas Company filed its answer admitting that it was receiving 10¢ per M. cu. ft. for all gas delivered to the Oklahoma Natural Gas Company and, in substance, stated the reason it had declined to pay 9¢ per M. cu. ft. for the gas was because the complainant, Home Gas Company, would not agree to sell the Creek County Gas Company its gas longer than the first of December; that there was a greater demand for gas during the winter months than the summer months; that the price of 9¢ means the average price for the entire year.

Upon filing of the answer by the Creek County Gas Company, admitting that it was receiving 10¢ per M. cu. ft. for gas, the Commission on the 12th day of June, 1920, issued an order requiring the Creek County Gas Company to pay the complainant and all other parties from whom it was purchasing gas in the Cushing Field, 9¢ per M. cu. ft. for all gas delivered since the 15th of April, 1920, and to

continue to pay said amount at each regular pay day until further order of the Commission, and enjoined Milton Thompson and the Home Gas Company, and all other parties whose wells are connected with the pipe lines of the Creek County Gas Company from disconnecting said wells or any of them until further order of the Commission, and notified all parties that the case was set for final hearing at the office of the Commission at Oklahoma City on the 25th day of July, 1920, at the hour of 10:00 o'clock a. m. and all parties who objected to making the order permanent were notified to appear and show cause why said order should not be permanent.

On the 25th day of April the Home Gas Company appeared by its attorney, president and secretary, Milton Thompsin in person, some royalty owners, and the Creek County Gas Compan, , by its attorney and president. The facts disclosed upon the uncontradicted evidence are substantially as follows:

That sometime during the month of March the Creek County Gas Company and the Oklahoma Natural Gas Company were negotiating in reference to making a contract for the sale of all the surplus gas under the control of the Creek County Gas Company, said gas when delivered to the Oklahoma Natural Gas Company was to be delivered by it to the consumers in the cities of Oklahoma, and it was represented that the minimum amount of gas to be delivered from the Creek County Gas Co. to the Oklahoma Natural Gas Company was 20,000,000 cu. ft. daily. Because of this volume of gas collected and ready for delivery the Oklahoma Natural Gas Company filed application with the Commission to advance its rates to the consumer so it would be able to pay the amount demanded by the Creek County Gas Company, the Creek County Gas Company representing to the Commission that the amount of increase it received was to be passed on and given to the well owners for the purpose of encouraging the drilling of wells. The Commission authorized the raise in rates,

effective March 15, 1920. The negotiations between the Creek County Gas Company and the Oklahoma Natural Gas Company not having developed into a contract for the sale of said gas on April 1st, the Commission rescinded its order, and upon a further showing that the contract had been made and gas delivered thereunder on the 15th day of April, 1920, the Commission reinstated its former order authorizing an increase to the consumers effective April 15, 1920, that is, all gas delivered to the consumers after the 15th day of April would be subject to the increased schedule.

The evidence further shows that all of the surplus gas was delivered to the Wichita Natural Gas Company by the Creek County Gas Company up to and including the 15th day of April, for which the Creek County Gas Company received 7¢ per M. cu. ft., and paid the well owners 6¢ per M. cu. ft.

The evidence also shows that the Creek County Gas Company increased the flat drilling rate for gas used under boilers per day of 24 hours from $10.00 to $15.00, representing to the consumers that this increase was made because the price of gas was increased at the well.

It was also shown by the testimony that less than 10% of the gas was used for drilling wells.

It was also shown from the testimony that the Creek County Gas Company had sent out notices to some of the gas producers and had talked to others over the 'phone to the effect that the price of gas would be increased at the well to 9¢ per M. cu. ft. on and after April first.

From the statements of the contentions made by the counsel for the complainants and defendants, the matters to be determined by the Commission at this time are as follows:

1st. The complainants contend that they should re-

ceive 9¢ per M. cu. ft. for gas from and including the first day of April, to and including the 15th day of April.

2nd. That complainants should not be enjoined from disconnecting their wells from the Creek County Gas Company's pipe lines.

1st. The Creek County Gas Company contends that having complied with the order of the Commission and paid 9¢ per M. cu. ft. from the 15th day of April, that it should not be required to pay 9¢ per M. cu. ft. during the first 15 days in April, because it only received 7¢ per M. cu. ft. for said gas during that period.

2nd. That the complainants should not be permitted to disconnect their pipe lines from the pipe lines of the Creek County Gas Company without being authorized by the Commission so to do.

As to the first proposition, that the Creek County Gas Company be required to pay 9¢ per M. cu. ft. to the defendant during the first half of April, it may be said that the Commission's jurisdiction in this case is derived under its general authority to regulate the sale and distribution of gas for public consumption throughout the State, also where controversy exists between the public service company and the well owners by virtue of a special statute, same being Section 3, Chapter 198 of the Session Laws of 1913, which reads as follows:

> "Any person, firm or corporation, taking gas from a gas field, except for the purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall

be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas."

The Commission has the authority to prescribe the price that the Creek County Gas Company should pay for gas at the well; however, it was contended by the complainants that by virtue of the announcement and statements of the Creek County Gas Company that the price of gas at the well on and after April 1st would be 9¢, it thereby obligated itself to pay 9¢, and that the complainants were entitled to said amount. It was contended by the Creek County Gas Company that these statements were made, based upon the assumption that it would receive more for gas on and after April 1st in its final settlement with the Wichita Pipe Line Company, and that the Wichita Pipe Line Company refused to pay it; hence, the Creek County Gas Company received 7¢ for gas delivered to said Wichita Pipe Line Company during this period. It received for its services 1¢ per M. cu. ft. less the shrinkage and other expenses in gathering and delivering the gas to the Wichita Pipe Line Company. The shrinkage is estimated at from 5% to 10%; assuming that it was 5% it would leave the Creek County Gas Company about ½¢ per M. cu. ft. for the use of its facilities and the operating expense in delivering the gas.

The Commission announced at its hearing that in prescribing rates it gave no consideration whatever to contracts; that it dealt with the relative facts in prescribing rates and that all contracts attempting to fix rates between different public service companies, or between well owners and public service companies are void so far as they attempt to fix a rate which may affect the price of gas to the consumers. The Commission stated at the hearing, very clearly, that a complete public service utility for the furnishing of natural gas to consumers consisted of natural gas wells connected with pipe lines, which pipe lines were connected with the facilities of the consuming public.

The owner of a gas well may cap the same or use it for his own use and may refuse to sell any portion of said gas to the public, and may refuse to connect the well with the public utility pipe line, and may remain absolute master of such gas well, but when he voluntarily connects the same with a public utility it becomes one of the essential parts of that utilty and is subject to the same rules and regulations by the Commission as the pipe lines of said utilities are subject to.

There are two grounds of jurisdiction of the Commission in this case:

Where private property is used for a public purpose to an extent that the public acquires an interest in the use, it is subject to regulation. To illustrate: When a gas well is by voluntary act of its owner connected with a pipe line, by that act the well owner holds out to the gas user that he is willing to supply them with gas so long as his well produces gas. The gas user relying upon this fact equips his premises with the necessary apparatus to burn the gas —can the well owner at any time that suits his whim or convenience disconnect his well and leave the gas users without gas, or possibly other fuel? We say not.

The principle involved is clearly defined by the United States Supreme Court in *Munn* v. *Illinois*, 94 U. S. 278, 24 L. Ed. 77, wherein the Court held:

> "When private property is devoted to public use, it is subject to public regulation.
>
> "A mere common law regulation of trade or business may be changed by a statute."

The Commission is given jurisdiction in this case by the express provisions of Chapter 93, Session Laws of 1913.

The term "public utility" as defined in the first section of said act, page 150, is as follows:

> "The term 'public utility', as used in this act, shall be taken to mean and include every corporation, as-

sociation, company, individuals, their trustees, lessees or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public."

The Corporation Commission under its jurisdiction and authority as hereinafter stated, prescribed rates to the public and fixed rates in case of dispute between well owners and pipe line owners, or between two pipe line companies, based upon the facts in each particular case and without any reference whatever to former or present contractual relations. The Commission may, at any time, regardless of so-called existing contracts, readjust the rates fixing the rate to the consumers, and then providing the rate so paid be apportioned equitably to the various agencies constituting the entire public service, from and including the well, to each intermediate agency assisting in performing the service; hence, in this case the plaintiff * * * are not entitled to 9¢ per M. cu. ft. for the first 15 days of April, 1920.

As to the increase of the drilling rate from $10.00 to $15.00 per day of 24 hours, it was contended by the Creek County Gas Company that the Commission had authorized a maximum rate of 20¢ per M. cu. ft. for temporary drilling purposes effective October 1, 1918, and that $15.00 per day flat rate did not equal the rate of 20¢ per M. cu. ft. as stated by complainant, Milton Thompson, that a boiler would consume from 80 to 100 cu. ft. per day. Without more definite information as to the average amount of gas consumed by boilers, the Commission will make no order at this time, but any user of gas under boilers will be permitted to introduce evidence to show that the amount paid for gas consumed under boilers is in excess of the rates prescribed by this Commission and if such showing is made the Commission will order a refund for all excess.

As to the contention that the complainants in this case be permitted to disconnect their wells from the pipe lines of the Creek County Gas Company, indirectly the pipe lines of the Oklahoma Natural Gas Company which is serving various cities and towns in the State of Oklahoma, is virtually disposed of by the law hereinbefore referred to. The Commission has never permitted a pipe line to discontinue service from the public or any portion of the public except upon the application and express authority from the Commission. The wells, when voluntarily connected being a part of the public utility, is subject to the same rules and regulations.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED, that the Creek County Gas Company shall pay to all well owners from whom it is purchasing gas in the Cushing Field on the basis of 9¢ per M. cu. ft. for all gas so taken since the 15th day of April, 1920, to the next regular pay day, and to continue to pay said amount at each regular pay day until further order of the Commission. By "pay day" is meant the day upon which the Creek County Gas Company has been paying for gas so purchased during the previous month.

The complainants herein, Milton Thompson and the Home Gas Company, and all other parties whose gas wells are connected with the pipe lines of the Creek County Gas Company are hereby ordered, restrained and enjoined from disconnecting said wells, or any of them that are now connected with the Creek County Gas Company's pipe lines until further order of the Commission.

Dated at Oklahoma City, Oklahoma, on this first day of July, 1920.

CORPORATION COMMISSION OF OKLAHOMA,
Art L. Walker, Chairman;
Campbell Russell, Commissioner.

Attest: P. E. Glenn, Acting Secretary.

APPENDIX E

Chapter 198, Okla. Sess. Laws 1913:

"NATURAL GAS—OWNERSHIP DEFINED AND OUTPUT RESTRICTED.

"Senate Bill No. 130.

"AN ACT defining ownership of natural gas, providing for the taking of same and making it larceny to take natural gas except as herein provided.

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

"Ownership defined.

"Section 1. All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees, of the surface under which gas is located in its original state. (52 O. S. 1941, sec. 231).

"Rights of owners—restrictions on output.

"Section 2. Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the Corporation Commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells

by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well. (52 O. S. 1941, sec. 232).

"Purchasers of output—prices and amounts of gas to be taken.

"Section 3. Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas. (52 O. S. 1941, sec. 233).

"Taking more than share of gas—damages and penalties.

"Section 4. Any person, firm or corporation, taking more than his or its proportionate share of such gas, in violation of the provisions of this act, shall be liable to any adjoining well owner for all damages sustained thereby and subject to a penalty for each violation not to exceed five hundred dollars ($500.00), and each day such violation is continued shall be a separate offense. (52 O. S. 1941, sec. 234).

"Violations of act—punishment.

"Section 5. Any person or agent of a corporation, who takes gas, or aids or abets in the taking of gas, except as herein provided, either directly or indirectly, as an individual, officer, agent, or employee of any corporation, shall be guilty of grand larceny, and, upon conviction thereof, shall be sentenced to the penitentiary not to exceed five (5) years. (52 O. S. 1941, sec. 235).

"Approved May 16, 1913."

APPENDIX F

Chapter 197, Okla. Sess. Laws 1915:

"NATURAL GAS—WASTE.

House Bill No. 395.

"AN ACT to conserve natural gas in the State of Oklahoma, to prevent waste thereof, providing for the equitable taking and purchase of same, conferring authority on the Corporation Commission, prescribing a penalty for violation of this Act, repealing certains acts, and declaring an emergency.

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

"Waste prohibited.

"Section 1. That the production of natural gas in the State of Oklahoma, in such manner, and under such conditions as to constitute waste, shall be unlawful. (52 O. S. 1941, sec. 236).

"Waste defined.

"Section 2. That the term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas. (52 O. S. 1941, sec. 237).

"Conservation of Gas.

"Section 3. That whenever natural gas in commercial quantities, or a gas bearing stratum, known to contain natural gas in such quantity, is encountered in any well drilled for oil or gas in this state, such gas shall be confined to its original stratum until such time as the same can be produced and utilized with-

out waste, and all such strata shall be adequately protected from infiltrating waters. Any unrestricted flow of natural gas in excess of two million cubic feet per twenty-four hours shall be considered a commercial quantity thereof; provided, that if in the opinion of the Corporation Commission, gas of a lessor quantity shall be of commercial value, said Commission shall have authority to require the conservation of said gas in accordance with the provisions of this Act; and provided, further, the gauge of the capacity of any gas well shall not be taken until such well has been allowed an open flow for the period of three days. (52 O. S. 1941, sec. 238).

"Excess Gas Supply—Apportionment.

"Section 4. That whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right

to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. (52 O. S. 1941, sec. 239).

"Common Purchaser—Fair Treatment.

"Section 5. That every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another save as authorized by the Corporation Commission after due notice and hearing; but if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade. (52 O. S. 1941, sec. 240).

"Hearings Before Corporation Commission—How Conducted.

"Section 6. That any person, firm or corporation, or the Attorney General, on behalf of the state may institute proceedings before the Corporation Commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this Act; and jurisdiction is hereby conferred upon said commssion to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein by publication in some newspaper or newspapers having general circulation in the state, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction said commission is authorized to summon witnesses, make ancillary orders, and use such means and final process including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law. (52 O. S. 1941, sec. 241).

"Appeals to Supreme Court.

"Section 7. That appellate jurisdiction is hereby conferred upon the Supreme Court of this state to review the orders of said commission made under this Act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from, may be superseded by the commission or by the Supreme Court upon such terms and condition as may be just and equitable. (52 O. S. 1941, sec. 242).

"Power of Corporation Commission—Rules and Regulations.

"Section 8. That the Corporation Commission shall have authority to make regulations for the prevention of waste of natural gas, and for the protection of all natural gas, fresh water, and oil bearing strata encountered in any well drilled for oil or natural gas, and to make such other rules and regulations, and to employ or appoint such agents, with the consent of the Governor, as may be necessary to enforce this Act. (52 O. S. 1941, sec. 243).

"Acceptance by Pipe Lines.

"Section 9. Before any person, firm or corporation shall have, possess, enjoy or exercise the right of eminent domain, right of way, right to locate, maintain, construct or operate pipe lines, fixtures, or equipments belonging thereto or used in connection therewith, for the carrying or transportation of natural gas, whether for hire or otherwise, or shall have the right to engage in the business of purchasing, piping, or transporting natural gas, as a public service, or otherwise, such person, firm or corporation, shall file in the office of the Corporation Commission a proper and explicit authorized acceptance of the provisions of this Act. (52 O. S. 1941, sec. 244).

"Duties of Mine Inspector Unchanged.

"Section 10. That nothing contained in this Act shall be construed to interfere with any duties now imposed by law upon the Chief Mine Inspector of the state or his deputies. (52 O. S. 1941, sec. 245).

"Validity of Several Sections of Act Independent.

"Section 11. That the invalidity of any section, subdivision, clause, or sentence of this Act shall not in any manner affect the validity of the remaining portion thereof. (52 O. S. 1941, 246).

"Penalties for Violation.

"Section 12. That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of contempt jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment. (52 O. S. 1941, sec. 247).

"Emergency.

"Section 13. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in force from and after its passage and approval.

"Approved March 30, 1915."

Chapter 3, Title 52, Section 3, Okla. Session Laws 1945:

"Waste of Gas—Definition.

"Section 3. Section 86, Title 52, Oklahoma Statutes, 1941. is hereby amended to read as follows:

" 'Section 86. The term "waste", as applied to gas, in addition to its ordinary meaning, shall include the inefficient or wasteful utilization of gas in the operation of oil wells drilled to and producing from a common source of supply; the inefficient or wasteful utilization of gas from gas wells drilled to and producing from a common source of supply; the production of gas in such quantities or in such manner as unreasonably to reduce reservoir pressure or unreasonably to diminish the quantity of oil or gas that might be recovered from a common source of supply; the es-

cape, directly or indirectly, of gas from oil wells producing from a common source of supply into the open air in excess of the amount necessary in the efficient drilling, completion, or operation thereof; waste incident to the production of natural gas in excess of transportation and marketing facilities or reasonable market demand; the escape, blowing, or releasing, directly or indirectly, into the open air, of gas from wells productive of gas only, drilled into any common source of supply, save only such as is necessary in the efficient drilling and completion thereof; and the unnecessary depletion or inefficient utilization of gas energy contained in a common source of supply. In order to prevent the waste or to reduce the dissipation of gas energy contained in a common source of supply, in addition to its other powers in respect thereof, the Commission shall have the authority to limit the production of gas from wells producing gas only to a percentage of the capacity of such wells to produce. The production of gas in the State of Oklahoma in such manner and under such conditions as to constitute waste as in this Act defined is hereby prohibited, and the Commission shall have authority and is charged with the duty to make rules, regulations, and orders for the prevention of such waste and for the protection of all fresh water strata and oil or gas bearing strata encountered in any well drilled for gas.'"